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No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA AND THE SIOUX TRIBE OF INDIANS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Oglala Sioux Tribe can be dismissed from Docket 74 without prejudice.

2. Whether Sioux Territory recognized by Article 5 of the 1851 Ft. Laramie Treaty, and located outside the boundaries of the Great Sioux Reservation, was confiscated by the Act of February 28, 1877 rather than ceded by the 1868 Treaty, thereby entitling the Oglala Sioux Tribe to interest on the award under the Good Faith Effort Test.

LIST OF PARTIES

Pursuant to Rule 28.1 of the Rules of the United States Supreme Court, the following is a list of all parties to the proceedings before the United States Court of Appeals for the Federal Circuit, to-wit:

Appellants/Cross-Appellees: The Oglala Sioux Tribe and the Cheyenne River Sioux Tribe.*

Cross-Appellants: The Sioux Tribe of Indians.

Appellee/Cross-Appellant: The United States of America.

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*After the Cheyenne River Sioux Tribe filed a notice of appeal, the Bureau of Indian Affairs disapproved its contract with its new claims counsel on the basis that it already had a contract with counsel for the Sioux Tribe of Indians. Thus, the tribe failed to file a brief and present oral argument in this appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

—o—

Petitioner Oglala Sioux Tribe respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Federal Circuit entered in these proceedings on December 5, 1986.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit is reported at 806 F.2d 1046. The original opinion and judgment appears in Appendices 1 to 18. The Final Judgment and Order of the Claims Court terminating Docket 74 appears at 8 Cl.Ct. 80 (1985), Appendix 19-51.

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JURISDICTION OF THE COURT

The final Judgment and Opinion of the Federal Circuit were filed and entered on December 5, 1986. This Petition for a Writ of Certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

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TREATIES AND STATUTE INVOLVED

The treaties provisions involved are Article 5 of the 1851 Ft. Laramie Treaty (11 Stat. 749) (Appendix D) and Articles 2, 4, 11, 12, 15 and 16 of the 1868 Ft. Laramie Treaty (15 Stat. 635) (Appendix E). The statute involved is Article 1 of the Act of February 28, 1877 (19 Stat. 254) (Appendix F).

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STATEMENT OF THE CASE

In 1851, the United States entered into a treaty at Ft. Laramie with the Sioux Nation.[1] (11 Stat. 749). This treaty recognized Sioux title to 60 million acres of territory southwest of the Missouri River in the present states of Montana, North Dakota, Wyoming, South Dakota and Nebraska. See *Sioux Tribe v. United States,* 15 Ind. Cl. Comm. 577, 601 (1965); *Sioux Tribe v. United States,* 500 F.2d 458, 460 (Ct.Cl. 1974). Also see Map at Appendix G, which designates the territory originally claimed by the Sioux in Docket 74. The Treaty also provided that the Sioux would not "abandon or prejudice any rights or claims they may have to other lands" or "surrender the privilege of hunting . . . or passing over" any tracts recognized in other tribes.

During the 1860s, the United States attempted to build a road across the 1851 treaty territory without Sioux consent. See *Sioux Tribe v. United States,* 23 Ind. Cl. Comm. 358, 362 (1970). This resulted in the Powder River War of 1866-1868 which culminated with the 1868 Ft. Laramie Treaty. *United States v. Sioux Nation of Indians,* 448

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[1]The term 'Sioux' or 'Sioux Nation' or 'Sioux Tribe' has been used by the United States to refer to different entities at different times." *Sioux Nation v. United States, 24 Ind. Cl. Comm.* 147, 150 (1970). "In its broadest context, the Sioux Nation is composed of seven divisions: (1) Medawakantons; (2) Sissetons; (3) Wahpakootas; (4) Wahpetons; (5) Yanktons; (6) Yanktonais; and (7) Tetons." *Sioux Nation v. United States,* 24 Ind. Cl. Comm. 147, 162 (1970). In the context of Docket 74, the Claims Court recognized that there is no legal entity called the "Sioux Nation" and that the court "adopted such terminology in the interests of clarity for purposes of a complex case." *Sioux Nation v. United States,* 8 Cl.Ct. 80 (1985), Appendix C at 20 n.2. Of the seven divisions of Sioux, only the Teton and Yanktons were parties to the 1851 Treaty. *Sioux Nation v. United States,* 24 Ind. Cl. Comm. 147, 155 (1970).

U.S. 371, 374 (1980). No cession of Sioux Territory was intended by the Sioux or United States in the 1868 Treaty.[2]

In 1874, the United States Army planned and undertook an exploratory expedition into the Black Hills portion of the Great Sioux Reservation created under Article 2 of the 1868 treaty. See map at Appendix G. The expedition was led by Lt. Col. George A. Custer who sent out glowing reports of gold in the Hills. This led to an invasion of the Hills by white miners and settlers in violation of the 1868 Treaty and created an intense popular demand on Congress to open the Hills for settlement. The United States subsequently withdrew its role as enforcer of the 1868 Treaty, which increased the influx of settlers into the Hills, and concluded that the only practical course was to secure the right of U.S. citizens to mine the Black Hills for gold. *United States v. Sioux Nation of Indians, supra,* 448 U.S. at 376-78.

In the winter of 1875-76, many Sioux were hunting in the unceded territory north of the North Platte River in accordance with Articles 11 and 16 of the 1868 Treaty. See map at Appendix G. The Commissioner of Indian Affairs sent instructions to the Indians in the unceded territory that they would be declared "hostile" if they did not return to their reservation by January 31, 1876. The Army's campaign against the "hostiles" led to Custer's defeat at the Little Big Horn on June 25, 1876. *United States v. Sioux Nation of Indians, supra,* 448 U.S. at 379.

On August 15, 1876, Congress passed an appropriations bill (19 Stat. 176) which provided that no further

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[2]See p. 9 and footnote 9 infra.

appropriation would be made for the subsistence of the Sioux, unless they first relinquished their rights to the hunting grounds outside the Great Sioux Reservation, ceded the Black Hills portion of the Great Sioux Reservation, and reached some accommodation with the Government that would enable them to become self-supporting. To this end, Congress requested the President to appoint a commission to negotiate a cession of the Hills. *United States v. Sioux Nation of Indians, supra,* 448 U.S. at 381.

The 1876 Commission could not obtain the requisite three-fourths adult male signatures required by Article 12 of the 1868 Treaty to accomplish a cession of the Black Hills. Congress thus resolved the impasse by enacting the agreement into law on February 28, 1877 (19 Stat. 254) (Appendix F), thereby confiscating the Black Hills, other Sioux territory outside the Great Sioux Reservation, and Sioux hunting rights. *United States v. Sioux Nation of Indians, supra,* 448 U.S. at 381-82. For over a century, the Oglala Sioux (and other 1868 Treaty Sioux) have claimed that the United States unlawfully abrogated the 1868 Treaty by enacting the 1877 Act.

In 1946, Congress passed the Indian Claims Commission Act (25 U.S.C. 70 *et seq.*) to hear and determine tribal claims against the United States. The Sioux filed their original Docket 74 treaty claim with the Commission on August 15, 1950.[3] The Commission thereafter bifurcated that claim, separating the claims under the 1868 Treaty

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[3]This claim was previously filed in the Court of Claims under the Act of June 3, 1920 (41 Stat. 738) and subsequently dismissed by that court. See *Sioux Tribe v. United States,* 97 Ct.Cl. 613 (1942), cert. denied, 318 U.S. 789 (1943).

(Docket 74-A—now commonly referred to as "Docket 74") from those under the 1877 Act (Docket 74-B Black Hills claim). *Cheyenne River Sioux Tribe v. United States,* 806 F.2d 1046, 1048 (Fed.Cir. 1986) (Citing *Sioux Nation of Indians v. United States,* 33 Ind. Cl. Comm. 151, 152-53 (1974)). Docket 74 involves: (1) an aboriginal title claim for 14 million acres located east of the Missouri River in North and South Dakota,[4] and (2) a recognized title claim for 34 million acres located southwest of the Missouri River in the states of North Dakota, Montana, Wyoming, and Nebraska.[5] See map at Appendix G.

In 1976, the Indian Claims Commission concluded that, as of February 24, 1869, the fair market value of both the aboriginal and recognized title areas was $45,685,000.00.[6] See *Sioux Tribe v. United States,* 38 Ind.Cl.Comm. at 485-86, 530 (1976). The award was later reduced to a final judgment of $43,949,700.00 to reflect the value of the in-

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[4]Only the Teton and Yanktonai have aboriginal title to the 14 million acres east of the Missouri River. See *Sioux Nation v. United States,* 23 Ind. Cl.Comm. 419, 424 (1970).

[5]The recognized title claim in Docket 74 includes all 1851 treaty lands outside of the original Great Sioux Reservation. Only the Teton Sioux plaintiffs (i.e., Brule, Oglala, Minneconjou, Hunkpapa, Blackfeet, Two Kettle and Sans Arc) have recognized title to these lands. *Sioux Nation v. United States,* 24 Ind. Cl. Comm. 147, 155, 158, 173-74 (1970).

[6]The February 24, 1869 date was used as the date of evaluation of the claim, since this is the date the 1868 Treaty was proclaimed, see 38 Ind. Cl. Comm. at 471; 23 Ind. Cl. Comm. at 425, and the Indian Claims Commission had previously ruled that both the aboriginal and recognized title areas were ceded by the Sioux to the United States in the 1868 Treaty. See *Sioux Nation v. United States,* 23 Ind. Cl. Comm. 419, 424, 439 (1970); *Sioux Nation v. United States, 24 Ind. Cl. Comm.* 147, 175-76 (1970). The Federal Circuit, however, now treats all Sioux Territory outside the Great Sioux Reservation as aboriginal title land. See *Cheyenne River Sioux Tribe v. United States,* 806 F.2d 1046, 1047 (Fed.Cir. 1986).

terest claimed by the Yankton Sioux in the recognized title area.[7]

In 1978, the Indian Claims Commission rendered its final decision on the merits, land valuation, and offsets. *Sioux Tribe v. United States*, 42 Ind. Cl. Comm. 214 (1978). The matter came before the commission on a motion filed by the Sioux tribes for "an order that no offsets, either payments on the claim or gratuities, be deducted" from the award in Docket 74."[8] *Id.*, 42 Ind. Cl. Comm. at 214.

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[7]The Yankton's interest was found by the Indian Claims Commission to be 17%. *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147, 158, 175 (1970). This was later reduced to 7%. See *Sioux Nation v. United States*, 42 Ind. Cl. Comm. 214, 257 (1978). Also see *Sioux Nation v. United States*, 41 Ind. Cl. Comm. 160 (1977), aff'd., 616 F.2d 485, 494 (Ct.Cl. 1980).

[8]The Claims Court defined offsets as follows:

> Gratuitous offsets and payments on the claim are two different types of statutory offsets authorized by the Indian Claims Commission Act. * * *
>
> Payments on the claim offsets relate to treaty obligations undertaken by the United States in exchange for the benefit received. In this case, the benefit received by the United States was the ceded Sioux tribal land exclusive of the Great Sioux Reservation set up by the 1868 Treaty. In order to be offset as payments on the claim, defendant's financial obligations must have been undertaken for exclusive benefit of the Sioux in exchange for tribal land. Obligations assumed for any other reason, such as the maintenance of peace, may not be offset as payments on the claim. * * * Payments on the claim are considered mandatory offsets.
>
> Gratuitous offsets are expenditures for which the Government "has not assumed any obligation, direct or incidental, as a party to the treaty or * * * pursuant to the intention of treaty." * * * Gratuitities are never undertaken as treaty-related consideration; they are Government expenditures made simply for the benefit of the tribe. In deciding whether to allow gratuitious offsets, courts must consider whether

(Continued on following page)

The Indian Claims Commission indicated that "[i]n determining whether certain payments made by the United States are consideration for Indian lands the Commission must look to see what the parties agreed to" in the 1868 Treaty. *Sioux Tribe v. United States, supra,* 42 Ind. Cl. Comm. at 216. The Commission found that it could not,

> [d]etermine from the language of the treaty whether the payments and benefits promised by the United States were in exchange for peace or other promises, as contended by the plaintiffs, or were in exchange for the cession of Sioux lands, as urged by the defendant. *Sioux Tribe v. United States, supra,* 42 Ind. Cl. Comm. at 219-20. The Commission therefore found it "necessary to examine the history and negotiations leading up to the treaty in an attempt to ascertain the intent of the parties."

After examining the history behind the Sioux claim, the Commission found that:

> The Indian Peace Commission presented the proposed treaty to the Sioux bands in a series of councils held in the spring of 1868. * * * At these councils, after hearing an explanation of the terms of the treaties, the Sioux generally voiced these sentiments; . . . 2—they were unwilling to cede any of their lands; . . . [Emphasis Supplied].

Sioux Tribe v. United States, supra, 42 Ind. Cl. Comm. at 224. After reciting portions of the treaty negotiations, the Commission further found that:

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> to allow gratuitous offsets, courts must consider whether "the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action." * * * [Case citations omitted].

Sioux Tribe v. United States, 6 Cl.Ct. 91, n.2 (1984).

> From this recitation it is clear that, based on the representation of the United States negotiators, *the Indians cannot have regarded the 1868 treaty as a treaty cession. Nowhere in the history leading up to the treaty or in the treaty negotiations themselves is there any indication that the United States was seeking a land cession or that the Sioux were willing to consent to one. On the contrary, the evidence is overwhelming that the Sioux would never have signed the treaty had they thought they were ceding any land to the United States.*[9] Since, in our opinion, the Sioux intended no cession, they could only regard any benefits accruing to the tribe as payment for the keeping of the peace under Article 11 of the 1868 treaty. Thus, the context of our inquiry, any payments made by the United States cannot be construed as consideration for lands ceded. [Emphasis Supplied].

Sioux Tribe v. United States, supra, 42 Ind. Cl. Comm. at 226.

Despite these findings, the Indian Claims Commission indicated that "whatever the intentions of the signatory parties, the 1868 Treaty did in fact effectuate a cession"

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[9]Historical evidence indicates that: (1) the Indians would fight to the death to retain the Power River country, 42 Ind. Cl. Comm. at 241, (2) Two Lance, a Two Kettle, indicated that his people did not want to give up their land, 42 Ind. Cl. Comm. at 241, (3) One Horn stated that the Sioux would never cede their country, 42 Ind. Cl. Comm. at 248, (4) Sitting Bull announced that he had no intention of selling any land to the whites, 42 Ind. Cl. Comm. at 249, (5) General Sanborn added that the government understood "when you tell us that you don't want to receive any present, that you don't wish to be thought of as selling your land. We are not going to give you the goods in exchange for any land . . .," 42 Ind. Cl. Comm. at 251, and (6) after the terms concerning the extent of Sioux territory and the provisions keeping out white people were read to him Red Cloud finally signed the treaty, 42 Ind. Cl. Comm. at 252.

and "the issue in the consideration stage here is not what in fact resulted from the signing of the 1868 Treaty, but rather what the Sioux understood and intended at the time of the signing." *Sioux Tribe v. United States, supra,* 42 Ind. Cl. Comm. at 226 n. 5. The Commission then concluded that,

> [A]s a matter of law that the goods and services promised by the United States under the 1868 treaty were not intended by the Sioux (or by the Government negotiators) to be consideration for any Sioux lands. The history of this case makes it clear that this treaty was an attempt by the United States to obtain peace on the best terms possible. Ironically, this document, promising harmonious relations, effectuated a vast cession of land contrary to the understanding and intent of the Sioux. Therefore, no consideration for the cession of Sioux lands under the 1868 treaty has been promised or paid and the defendant may not offset any part of the cost of these goods and services as payments on plaintiffs' claim for compensation.

Sioux Tribe v. United States, supra, 42 Ind. Cl. Comm. at 229.

In regards to the gratuitous offsets, the Indian Claims Commission incorporated findings in the Black Hills case (Docket 74-B) by reference and found that:

> [T]hese actions of the United States between 1875 and 1877 were grossly dishonorable. The Court of Claims in reviewing our 1974 decision, stated,
>
> > The duplicity of President Grant's course and the duress practiced on the starving Sioux, speak for themselves. A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history. . .

> We, of course, agree. The Commission concludes that the events described above so taint the course of dealings between the United States and the Sioux that we cannot in good conscience offset any gratuitous expenditures by the United States against any award in this docket. [Emphasis Supplied].

Sioux Tribe v. United States, supra, 42 Ind. Cl. Comm. at 232.

On appeal, the Court of Claims reversed the Indian Claims Commission's decision to deny claims and gratuitous offsets on the basis that the 1868 Treaty was primarily a treaty of cession rather than a treaty of peace. *United States v. Sioux Tribe,* 222 Ct.Cl. 421, 425, 616 F.2d 485, 487 (1980). In regard to the claim offsets, the Court of Claims reasoned that the offsets were in substantial part payment for land ceded to the United States under the 1868 Treaty. The denial of gratuitous offset was based on the failure of the Indian Claims Commission to consider the entire course of dealings between the various Sioux tribes and the United States. *United States v. Sioux Tribe, supra,* 222 Ct.Cl. at 425, 616 F.2d at 487. The Commission had considered dealings only between the years 1875 and 1877 when the Black Hills were confiscated. 222 Ct.Cl. at 431, 616 F.2d at 491-92.

The Court of Claims determined on remand that the only issue remaining in the case concerned the amount of the offsets to be allowed against the $43,949,700 ICC land valuation award. *United States v. Sioux Tribe, supra,* 222 Ct.Cl. at 436, 616 F.2d at —. The United States claims approximately $65,000,000 in offsets. *Sioux Tribe v. United States,* 8 Ind. Cl. Comm. 80 (1985) Appendix C at 21.

The parties subsequently filed six motions for summary judgment in regards to offsets. The Claims Court ruled on three of the motions, see 806 F.2d at 1049, Appendix A at 6, and on February 22, 1985, entered an order implementing the United States' settlement offer of $39,749,700 as its final judgment and terminated Docket 74.[10] *Sioux Tribe v. United States,* No. 74 (Cl.Ct., Feb. 22, 1985). Appeals were taken to the Federal Circuit.

On December 5, 1986, the Federal Circuit, without considering the treaty issues raised by the Oglala Sioux Tribe, vacated and remanded the Claims Court's February 22, 1985 order. *Cheyenne River Sioux Tribe v. United States,* 806 F.2d 1046, 1052-53 (Fed. Cir. 1986), Appendix at 15. This Petition for a Writ of Certiorari followed to review only those questions that the Federal Circuit refused to address.[11]

REASONS FOR GRANTING THE WRIT

I. THE CLAIMS COURT ERRED IN RULING THAT THE OGLALA SIOUX TRIBE CANNOT BE SEVERED FROM DOCKET 74 WITHOUT PREJUDICE.

The Oglala Sioux Tribe requested the Federal Circuit reverse the Claims Court's ruling that motions to dis-

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[10]The United States made offers to settle Docket 74 for $39,799,700. The majority of the Sioux tribes rejected the offers. See *Cheyenne River Sioux Tribe v. United States,* 806 F.2d 1046, 1048-49 (Fed. Cir. 1985), Appendix A at 5-6.

[11]The Oglala Sioux Tribe, along with the United States, prevailed in its position that the Claims Court improperly imposed the Government's settlement offer on the parties.

miss any of the individual tribal plaintiffs from Docket 74 without prejudice would be denied "[s]ince [the] case involves a single plaintiff, the Sioux Nation", and that the "Court cannot allow any of the reservation tribes which make up the plaintiff to sever themselves from this litigation." The Court reasoned that "[i]f such severance was allowed, the remaining four reservation tribes would be entitled to share in the full land evaluation amount" and would be "unjustly enriched." *Sioux Tribe of Indians v. United States*, 8 Cl. Ct. 80 (1970), Appendix C at 38-39. The Federal Circuit refused to decide this issue. See *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1051-52 (Fed. Cir. 1986), Appendix at 15.

A. The Oglala Sioux People demand land restoration as the solution to settlement of Article 11 and 16 lands and the Claims Court is without authority to grant such relief.

The Oglala Sioux Tribe has always avoided ratification of the 1877 confiscation of the Black Hills and what it views as the 1877 confiscation of its Article 11 and 16 1868 Treaty lands.[12] It has continuously struggled to have these lands, or portions thereof, restored to tribal ownership and control to regain economic self-sufficiency.

The Tribe authorized the filing of Docket 74 in the Indian Claims Commission in 1950, to preserve its claims within the American judicial system. Tribal officials were

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[12]As argued at pp. 18-21 *infra*, the Tribe does not accept the view that it ceded its recognized and aboriginal title lands in the 1868 Treaty. It has always been of the view that the Article 11 and 16 lands were confiscated by the 1877 Act along with the Black Hills. See e.g., Tribal Resolutions Nos. 84-47 and 83-160, Appendix C at 49-51.

informed at that time that the Tribe would forever lose these claims if not filed in the Commission within the five-year limitation period. See 25 USC 70(k) (1964). The claims were maintained through the years on the advice of claims counsel that a final monetary judgment would not foreclose restoration of some treaty lands by Congress.

In the mid-1970s, however, traditional Oglala Sioux tribal members became disenchanted with the Indian Claims Commission process and demanded fidelity to the 1868 Treaty and Sioux heritage. They began putting pressure on the federally recognized tribal government to withdraw from the Commission proceedings in both Dockets 74 and 74B. These tribal members saw the Commission as simply a device to quiet title to 1868 Treaty lands, while protecting the Federal purse by awarding tribal claimants unconscionable consideration.[13] For this reason, the Oglala Sioux Tribal Council charted a new course, proclaiming in 1978 that "the Black Hills are not for sale." The Tribal Council also allowed its claims attorney contract with Arthur Lazarus, Jr. to expire under its own terms in 1977.

In 1983, the Tribal Council passed Resolution No. 83-160 declaring it to be the official tribal position that the 1877 Act unconstitutionally confiscated the Article 11 and

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[13]Frank Fools Crow, a traditional headman of the Oglala people, summarized the Oglala people's position to Congress in 1976 as follows:

> We know the underlying policy behind the Claims Commission Act and we are not fooled. The government intends to clear title to the land illegally taken, to clear their own conscious before they terminate us . . .

See *Indian Claims Commission Act Amendment: Hearing Before the Subcommittee on Indian Affairs of the House Commit-*

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16 lands,[14] and the Tribe desired to withdraw from Docket 74 and seek land restoration "either through court action or as part of a final legislative settlement for the Black Hills controversy." See *Sioux Tribe v. United States*, 8 Ind. Cl. Comm. 80 (1985), Appendix C at 50-51.

The Claims Court was fully cognizant of Resolution No. 83-160 when it locked the Oglala Sioux Tribe into its February 22, 1985 Order Terminating Docket 74 and Awarding Final Judgment.

The Oglala Sioux Tribe has never been able to litigate title to *federally held* treaty lands, since Congress has limited the jurisdiction of the Indian Claims Commission to monetary compensation. *Sioux Tribe v. United States*, *supra*, App. at 38. The Claims Court's final judgment denying the tribe the right to withdraw from Docket 74 effectively locks the Tribe into a situation that greatly prejudices and inhibits its ability to obtain a just and honorable settlement for its Article 11 and 16 treaty lands in Congress.

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tee on Interior and Insular Affairs, 94th Cong., 2nd Sess. 141 (1976).

[14]The Oglala Sioux Tribe has never knowingly authorized Docket 74 to proceed upon the theory that tribal lands outside the Great Sioux Reservation were ceded by the 1868 treaty. If claims counsel would have properly informed the tribe that the claim was proceeding on this theory, it would have objected and refused to allow it. The cession theory is repugnant to all that the tribe believes the treaty stands for. The tribe authorized the filing of Docket 74 only upon the theory that tribal lands outside the reservation were confiscated by the 1877 Act. See *Sioux Tribe v. United States*, 500 F.2d 458, 484-86 (Ct.Cl. 1974) (Original Docket 74 petition "was based on the taking of their lands under the Act of 1877"). The Oglala Sioux Tribe does not wish to remain silent and thereby ratify the treaty cession theory that Docket 74 has proceeded under.

B. The Claims Court has authority under Rule 21 to sever the Oglala Sioux Tribe from Docket 74.

Rule 21 of the Claims Court provides in pertinent part that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." This gives the court authority to sever the Oglala Sioux Tribe from Docket 74.

The court refuses, however, to allow the tribe to be dismissed out of the case, without prejudice. The court indicated that even if such a motion to dismiss is filed, it will deny it on the basis that the case involves a single plaintiff and may result in unjust enrichment to the remaining tribes. *Sioux Tribe v. United States, supra,* App. C at 38-39. This finding is specious, since: (1) Any 1868 Treaty tribe can maintain this action, (2) The court has authority to adjust the respective interests of the parties to prevent a particular tribe from being unjustly enriched, and (3) The 1973 Distribution of Judgment Funds Act protects against unjust enrichment.

1. Any single tribe can maintain this action as plaintiff.

The fiction of a single plaintiff in claims litigation is suspect.[14] The tribes involved in Docket 74 are all dis-

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[14]As noted in note 1 *supra,* the Claims Court recognized that there is no legal entity called the "Sioux Nation" and that the court "adopted such terminology in the interests of clarity for purposes of a complex case." *Sioux Nation v. United States,* No. 74 (Ct. Cl. Feb. 22, 1985), App. at 92 n.2.

tinct sovereign entities recognized under federal law. *United States v. Sioux Tribe,* 222 Ct.Cl. 421, 616 F.2d 485, (Ct.Cl. 1980). The Indian Claims Commission has broad jurisdiction to hear and determine all claims against the United States on behalf of any "tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska." 60 Stat. 1049 (1946); 25 U.S.C. 70(a)(2) (1976). Thus, any one of the Sioux tribes could have initiated this action for their specific interest in the 1868 Treaty lands.

2. The Claims Court can adjust the respective interests of the Sioux tribes to prevent any tribe from being unjustly enriched.

The Claims Court could have made a decision limiting the Docket 74 award to the Sioux tribes who desire monetary compensation for the 1868 Treaty lands. In fact, the Court of Claims did just that in 1980 when it partitioned the Teton and Yankton interests. *Sioux Tribe v. United States,* 616 F.2d 485 (1980). Moreover, in its summary judgment opinion regarding land adjustment offsets, the Claims Court similarly decided the value of the Ponca interests in the Great Sioux Reservation and the Yankton Sioux Tribe's seven percent interest in the 1868 Ft. Laramie Treaty lands. *Sioux Tribe v. United States,* 7 Cl.Ct. 481 (1985).

Similar methods can be used by the Claims Court to adjudicate the monetary interests of the Sioux tribes desiring monetary compensation in Docket 74.

3. The 1973 Distribution of Judgment Funds Act protects against unjust enrichment of an Indian tribe.

The Claims Court also ignored the federal scheme for distributing claims awards. In 1973, Congress delegated most of the responsibility for the actual distribution of Indian land claims awards to the Secretary of the Interior under the Distribution of Judgment Funds Act. 87 Stat. 466; 25 U.S.C. 1401 *et seq.* Title to Indian lands are extinguished upon payment of the award by Congress. *United States v. Dann*, 84 L.Ed.2d 28 (1985). Once payment has been made, the Interior Department has six months to hold public hearings and submit a plan of distribution to Congress. The hearings are held to formulate a distribution plan to "best serve the interest of all those entities and individuals entitled" to share in the judgment. 25 U.S.C. 1403(a) and 1404(2) (1982). In its development of distribution plans, the Bureau of Indian Affairs determines the actual eligibility, respective portions and the use of judgment funds. Thus, the BIA is in a position and has the responsibility, to prevent a tribe from being unjustly enriched in the distribution of judgment funds.

II. THE FEDERAL CIRCUIT ERRED IN REFUSING TO CONSIDER THE QUESTION OF WHETHER SIOUX ABORIGINAL TERRITORY AND TERRITORY RECOGNIZED BY ARTICLE 5 OF THE 1851 FT. LARAMIE TREATY WAS CONFISCATED BY THE 1877 ACT, RATHER THAN CEDED BY THE 1868 FT. LARAMIE TREATY.

A. The 1868 Treaty did not effectuate a cession of any Sioux lands.

The Federal Circuit also refused to address the issue of whether the Claims Court incorrectly construed the 1868

Treaty and 1877 Act. See *Cheyenne River Sioux Tribe v. United States,* 806 F.2d 1046, 1051 (Fed. Cir. 1986), Appendix at 15. This was error since the Claims Court's final judgment is contrary to rules of treaty construction adopted by the Supreme Court which support the Oglala Sioux Tribe's position that, based on the evidence before the Indian Claims Commission, no cession of Sioux Territory occurred under the 1868 Ft. Laramie Treaty.

The Supreme Court has established rules of treaty construction which are relevant here and include the following:

—How the words of the treaty were understood by the tribe, rather than their critical meaning, should form the rule of construction. *Worcester v. Georgia,* 32 U.S. 515, 582 (1832); *United States v. Winans,* 198 U.S. 371, 380-81 (1905).

—Treaties made by the United States with Indian tribes are not to be interpreted narrowly, but are to be construed in the sense in which naturally the Indians would understand them in view of the fact that the United States seeks no advantage for itself in such treaties and friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. *United States v. Shoshone Tribe of Indians,* 304 U.S. 111, 116 (1938).

—Indian treaties are to be interpreted in the sense in which they would naturally be understood by the Indians and any ambiguity is to be resolved in their favor. *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 731 (1970); *Winters v. United States,* 207 U.S. 564, 576-77 (1908).

—In construing a treaty with Indians ceding lands the court will consider the difference in power and intelligence of the Indians and will not construe it as to make it an instrument of fraud to deprive them of more than they thought they were ceding. *North-*

ern Pacific Railway Co. v. United States, 227 U.S. 355 (1913).

As noted on pages 17-18, supra, the Indian Claims Commission conclusively found that the Sioux Indians never intended any cession of land in the 1868 Treaty. The Commission found that:

> [I]t is clear that, based on the representation of the United States negotiators, the Indians cannot have regarded the 1868 Treaty as a treaty of cession. Nowhere in the history leading up to the treaty or in the treaty negotiations themselves is there any indication that the United States was seeking a land cession or that the Sioux were willing to consent to one. On the contrary, the evidence is overwhelming that the Sioux would never have signed the treaty had they thought they were ceding any land to the United States.

Sioux Tribe v. United States, 42 Ind.Cl.Comm. 214, 226 (1978). Also see note 9, *supra.* While it is true that the interpretation of an Indian treaty is a question of law, *Sioux Tribe v. United States, supra,* 500 F.2d at 462, an Indian treaty must be interpreted in accordance with the above-stated rules of treaty construction. Based on the findings of the Indian Claims Commission that the Sioux never intended a cession of any of their lands in the 1868 Treaty, the federal courts must find, in accordance with the above-stated rules of treaty construction, that no cession was ever intended and no cession in fact occurred. These Supreme Court decisions are controlling precedent in this case.

The Federal Circuit nevertheless refused to consider the Oglala Sioux Tribe's treaty claims on the basis that these claims "were not raised before, or decided by, the Claims Court" and would therefore "not be decided on

appeal." *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046 (Fed.Cir. 1986), Appendix A at 15. Based on the evidentiary record established in the Indian Claims Commission, however, that neither the Sioux nor United States intended a land cession in the 1868 Treaty, the Federal Circuit erred as a matter of law in refusing to consider and correct the final judgment of the Claims Court which incorporated the Indian Claims Commission's interlocutory ruling that the 1868 Treaty effectuated a cession of all Sioux territory outside the Great Sioux Reservation. The Oglala Sioux Tribe sincerely believes that its treaty claims are meritorious and that it will suffer a manifest injustice if the Federal Circuit is not reversed and directed to consider the Tribe's claims.

If no cession of Sioux Territory occurred under the 1868 Treaty, all Sioux Territory recognized under the 1851 Treaty would have had to been taken under the 1877 Act. The Oglala Sioux Tribe may therefore be entitled to just compensation, plus interest, under the Good Faith Effort Test.[15] See *United States v. Sioux Nation of Indians*, 448 U.S. 371.

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CONCLUSION

Based on the foregoing argument, the Oglala Sioux Tribe respectfully prays that this Court reverse the Federal Circuit's final judgment and remand with instructions

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[15]The United States should also be collaterally estopped from asserting that the 1868 treaty effectuated a cession of Sioux territory, since it litigated this issue in 1922 and the Court of Claims ruled that no such cession occurred. See *Medawakanton and Wahpakoota Bands of Sioux Indians v. United States*, 57 Ct. Cl. 357 (1922).

to consider the issues of: (1) whether the Oglala Sioux Tribe is entitled to withdraw from Docket 74, and (2) whether the Claims Court incorrectly construed the 1868 Treaty and 1877 Act in implementing its final judgment.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHEYENNE RIVER SIOUX TRIBE
and OGLALA SIOUX TRIBE,

Appellants/Cross-appellees,

v.

and SIOUX TRIBE OF INDIANS,

Cross-appellants,

v.

THE UNITED STATES,

Appellee/Cross-appellant.

Appeal Nos.
85-2261
85-2262
85-2264
85-2269

Mario Gonzalez, Oglala Sioux Legal Department, of Pine Ridge, South Dakota, argued for appellants/cross-appellees.

Arthur Lazarus, Jr., Fried, Frank, Harris, Shriver & Jacobson, of Washington, D.C., argued for cross-appellants Sioux Tribe of Indians. With him on the brief were *Marvin J. Sonosky* and *William Howard Payne.*

Jacques B. Gelin, Department of Justice, of Washington, D.C., argued for appellee/cross-appellant. With him on the brief were *F. Henry Habicht, II,* Assistant Attorney General, *Edward J. Passarelli* and *Robert L. Klarquist.*

Appealed from U.S. Claims Court

Judge Yock

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHEYENNE RIVER SIOUX TRIBE and OGLALA SIOUX TRIBE,	)	
Appellants/cross-appellees,	)	Appeal Nos.
and SIOUX TRIBE OF INDIANS,	)	85-2261
	)	85-2262
Cross-appellants,	)	85-2264
	)	85-2269
v.	)	
THE UNITED STATES,	)	
Appellee/cross-appellant,	)	

DECIDED: December 5, 1986

Before MARKEY, *Chief Judge,* FRIEDMAN, *Circuit Judge,* and BENNETT, *Senior Circuit Judge.*

FRIEDMAN, *Circuit Judge.*

This is an appeal from a judgment of the United States Claims Court, in a proceeding under the Indian Claims Act, 25 U.S.C. §§ 70 to 70n-2 (1976), entered without trial or findings of fact, that awarded as a final judgment terminating the litigation the amount of a settlement negotiated between the United States and counsel for the Sioux Tribe of Indians, which a majority of the constituent tribes had rejected. We vacate and remand for further proceedings.

I

A. This case concerns compensation for lands acquired by the United States pursuant to a treaty with the tribes of the Sioux Nation (sometimes called the Sioux Tribe) signed on April 29, 1868. 15 Stat. 635 (1868 Treaty). The 1868 Treaty effected the cession of a large part of land in North and South Dakota, Nebraska, Wyoming, and Montana, to which the Sioux Nation had aboriginal title. It also established a reservation for the Indians and obligated the United States to provide various services and goods, and to make payments to the Sioux Nation.

The land reserved for the Sioux Nation by the 1868 Treaty included more than seven million acres in the Black Hills area of South Dakota. The Indians further retained the right to hunt in designated areas outside the reservation. The United States acquired this land and the hunting rights from the Sioux Nation by the Act of February 28, 1877, in which Congress "ratified" a treaty that the Indians had not approved. 19 Stat. 254 (1877 Act). The 1877 Act also required the United States to provide the Sioux Nation with services, goods, and "all necessary aid to assist . . . in the work of civilization."

B. The current litigation relating to these treaties and statutes was initiated by a claim the Sioux Nation filed in 1950 with the Indian Claims Commission (Commission). The Commission bifurcated that claim, separating the claims under the 1868 Treaty from those under the 1877 Act. *See Sioux Nation of Indians v. United States*, 33 Ind. Cl. Comm. 151, 152-53 (1974).

The Commission held that the government's acquisition under the 1877 Act of the lands and hunting rights

the Sioux Nation had retained under the 1868 Treaty constituted a taking of that property under the fifth amendment, for which the Indians were entitled to receive the fair market value of the land and other rights as of 1877, less the value of any compensation they had received, plus interest. *Id.* at 362-63. The Court of Claims affirmed most of the Commission decision, *Sioux Nation of Indians v. United States,* 601 F.2d 1157 (1979), *aff'd,* 448 U.S. 371 (1980). The Sioux Nation ultimately was awarded $105,994,430.52 for the taking under the 1877 Act. *See Sioux Nation of Indians v. United States,* 650 F.2d 244 (Ct. Cl. 1981).

The present case involves the claim under the 1868 Treaty. The Commission first determined that the Sioux Nation had aboriginal title to the land obtained by the United States under the Treaty. *Sioux Tribe v. United States,* 23 Ind. Cl. Comm. 419 (1970), *aff'd,* 500 F.2d 458, 470-72 (Ct. Cl. 1974). It subsequently found that the value of the land at the time of cession in 1869 was $45,685,000. *Sioux Tribe v. United States,* 38 Ind. Cl. Comm. 469, 532 (1976). The Commission disallowed any offsets by the government and, after making certain adjustments, awarded the Indians $43,949,700. *Sioux Tribe v. United States,* 42 Ind. Cl. Comm. 214, 257 (1978).

The Court of Claims reversed the denial of offsets. *United States v. Sioux Tribe,* 616 F.2d 485 (1980). It held that the 1868 Treaty was not a treaty of peace, as the Commission had held, but

> was in major part a treaty of cession. Thus, the payments the government undertook to make and the goods and services it undertook to supply to the Sioux were, at least in substantial part, compensation for

> the land the Indians ceded to the government. . . . The government accordingly is entitled to show which of the payments made and goods and services provided under the treaty were "payments . . . on the claim" that are to be offset against the award.

Id. at 487.

The court further held that in determining whether the government was entitled to any gratuitous offsets, *i.e.*, "money or property given to or funds expended gratuitously for the benefit of" the Indians, 25 U.S.C. § 70a (1976), the Commission was required to consider the " 'entire course of dealings' between the United States and the Indians," and could not deny gratuitous offsets, as the Commission did, solely by consideration of the years 1875-1877.

The court "remanded [the case] to [its] Trial Division to determine the merits of defendant's claim for offsets based on both alleged payments on the claim and gratuitous offsets." *Id.* at 494.

C. Prior to the Court of Claims remand, the government in October 1979 had made an offer to the Sioux Tribe's attorneys to settle the offset issue for $4,200,000. This would have produced an award of $39,749,700. The attorneys accepted the offer subject to conditions, which the government rejected. The Indians rejected the offer.

Before the Claims Court, the government asserted on the remand that it had offsets totaling $65 million.

In 1983, the government again offered to settle the offset issue for $4,200,000, but the eight member-tribes who constituted the Sioux Tribe refused to consider the settlement. The Claims Court, the successor to the Trial Division of the Court of Claims, then ordered the Sioux

Tribe's counsel formally to present the settlement offer to the tribes, and further directed the tribes, through their governing bodies, to consider and act upon the offer. *Sioux Tribe of Indians v. United States,* 3 Cl. Ct. 536 (1983).

Two of the tribes accepted the settlement, and four of them explicitly and two of them implicitly rejected it. *See Sioux Tribe of Indians v. United States,* 8 Cl. Ct. 80, 84, 86-90 (1985).

Following the Court of Claims remand in 1980, the judge of the Trial Division who was handling the case (the same individual now is the judge of the Claims Court to whom the case is assigned) directed the parties to file briefs on six legal issues relating to the offset question that the judge concluded were susceptible to summary disposition. Treating these briefings as, in effect, motions for summary judgment, the Claims Court in 1984 and 1985 issued three opinions deciding three of the summary judgment motions.

The court (1) rejected the Sioux Tribe's contention that the government be denied any offsets for payments on the claim (as distinguished from gratuitous offsets), (2) held that the government was not entitled to deduct any gratuitous offsets from the fair value of the land, and (3) permitted the government to offset the value of land ($2,769,021.40) that the government inadvertently conveyed to the Sioux Nation as part of the Great Sioux Reservation under the 1868 Treaty. *Sioux Tribe of Indians v. United States,* 6 Cl. Ct. 91 (1984), *Sioux Tribe of Indians v. United States,* 7 Cl. Ct. 468 (1985), *Sioux Tribe of Indians v. United States,* 7 Cl. Ct. 481 (1985). The three other motions for summary judgment present questions

relating to res judicata/collateral estoppel, the use of vouchers to prove offset claims, and miscellaneous issues. *See Sioux Tribe*, 8 Cl. Ct. at 83. The Claims Court has not decided those motions.

After the court issued its third summary judgment opinion, the court entered the judgment now under review. In that decision the court

> terminate[d] this litigation and . . . award[ed] the plaintiff $39,749,700 as fair and equitable compensation for its claims. This amount reflects the parties' counsels' negotiated settlement agreement as to what they considered to be fair and equitable compensation for the plaintiff's claims, and, more importantly, it represents an amount that this Court believes constitutes fair and equitable compensation for the plaintiff's historical claims, after taking into consideration the plaintiff's interlocutory land valuation award of $43,949,700 and the Federal Government's offset claims of some $65 million.

Id. at 81.

The court explained the reason for its action as follows:

> At this time, the instant litigation has devolved into an uncontrolled quagmire. Counsel for the plaintiff, after negotiating a fair and equitable settlement of this case, were unable to effectively present the offer to the reservation tribes without a court order directing the reservation tribe's [sic] to consider the offer. The simple fact that four of the reservation tribes are refusing to accept any settlement or award of this Court, which does not include the return of their land, is indicative of the plaintiff's [sic] refusal to comprehend, after 35 years of litigation, that this Court can only award money judgments.
>
> . . . .

> As a result, this Court can envision the continuation of this litigation ad infinitum . . . . Thus, the case grinds its way slowly forward, regardless of the wishes of the plaintiff or of its attorneys, putting an ever-increasing burden on the resources of this Court. It may well be that the past leaders of the current reservation tribes initiated this suit, some 35 years ago, for reasons that are no longer consistent with the wishes of the current tribal governing bodies. However that may be, some rational direction in this lawsuit must be given.

Id. at 85-86.

The court stated that it was "imposing the negotiated settlement offer neither as a sanction nor as a settlement offer *per se*, but simply as the Court's considered judgment as to what would be fair and equitable compensation for the Sioux tribal land ceded under the 1868 Treaty." *Id.* at 91-92.

The Sioux Tribe, the United States, and the Oglala Sioux Tribe (Oglala Tribe), one of the eight constituent tribes that comprise the Sioux Tribe, appealed from that judgment. The Sioux Tribe and the government sought summary reversal. In its motion for summary reversal, the Sioux Tribe argued:

> (1) A judgment entered upon a proposed settlement to which the parties have not agreed is indefensible on its face. All of the parties to these appeals agree that entry of the judgment was contrary to law.
>
> (2) The Claims Court plainly lacks power in equity or otherwise to enter judgment in the absence of a complete record—*i.e.*, without passing upon the merits of the Government's offset claims.
>
> (3) The age and posture of this case justify summary remand with instructions to decide the merits with priority over all other matters.

After this court denied summary reversal, the Sioux Tribe changed its position. It now asks this court to affirm the "highly advantageous" judgment of the Claims Court.

II

The Claims Court gave two reasons for awarding the Sioux tribe $39,749,700 as the final judgment "terminat[ing] this litigation": (A) "This amount reflects the parties' counsels' negotiated settlement agreement as to what they considered to be fair and equitable compensation for the plaintiff's claims"; (B) "[I]t represents an amount that this Court believes constitutes fair and equitable compensation for the plaintiff's historical claims."

Although the court understandably was frustrated by the inability of counsel to bring this overly protracted litigation to a conclusion and the insistence of four of the tribes upon a condition of settlement that was beyond the power of the court to award (return of the land they had ceded to the United States in 1868), neither of the grounds upon which the court relied justified the extraordinary action the court took of "impos[ing] the negotiated settlement offer as a final judgment and as a final solution to this case."

A. An unaccepted offer of settlement ordinarily is not admissible evidence to show either the existence or amount of liability. Fed. R. Civ. P. 68; Fed. R. Evid. 408; *Medtronic, Inc. v. Intermedics, Inc.*, 799 F2d 734, 741, 230 USPQ 641, 645 (Fed. Cir. 1986). The rule reflects the reality that permitting consideration of settlement offers as reflecting an admission of liability in the amount of the offer would seriously discourage parties from discussing settlement or making settlement offers. The law, however,

favors settlement of litigation which reduces the burden on courts and counsel and mitigates the antagonism and hostility that protracted litigation leading to judgment may cause. *See Bergh v. DOT, FAA,* 794 F.2d 1575, 1577 (Fed. Cir.), *cert. denied,* 55 U.S.L.W. 3333 (1986); *Cheyenne-Araphoe Tribes of Indians of Oklahoma v. United States,* 671 F.2d 1305 (Ct. Cl. 1982).

The imposition by the court upon the parties of a settlement that the parties rejected is inconsistent with this principle. Indeed, the Sioux Tribe so recognized in its motion for summary reversal (p. 8, *supra*). Unless a case is settled with the consent of the parties, the duty of the court is to determine the merits and enter judgment accordingly. Where, as here, the court adopts a settlement as its judgment without consideration of the relevant evidence (see part II B *infra*), the court has failed to perform its obligations to determine the case on the basis of the evidence.

The Supreme Court dealt with a similar issue in *United States v. Ward Baking Co.,* 376 U.S. 327 (1964). There the government filed a civil suit charging the defendants with violating section 1 of the Sherman Act. After extensive settlement negotiations, the defendants filed with the court a proposed "consent" judgment that contained various provisions prohibiting them from engaging in the conduct that the suit challenged.

The government objected to the proposed judgment on the ground that it omitted two necessary items of relief. The district court, however, entered the defendants' proposed judgment because it "provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint." *Id.* at 330.

The Supreme Court vacated the judgment and remanded the case for trial. The Court stated that in view of the government's allegations and the evidence in the record, "it cannot reasonably be assumed that the Government could not, at the trial, have introduced evidence justifying, in whole or in part, the relief sought." *Id.* at 333 (footnote omitted).

The Court held that

> where the Government seeks an item of relief to which evidence adduced at trial may show that it is entitled, the District Court may not enter a "consent" judgment without the actual consent of the Government.

Id. at 334.

The principle announced and applied in *Ward Baking* is equally applicable in the present case. The government here asserted that it had offsets totaling $65 million. Although the government offered to settle the case by applying $4.2 million in offsets, it was willing to make that concession only if the plaintiff in return agreed to terminate the litigation. There is no basis for concluding at this stage of the proceeding that, if the government went to trial, it could not establish offsets of more than $4.2 million. In these circumstances, the district court could "not enter a 'consent' judgment without the actual consent of the Government" (*Ward Baking*)—a consent that was not forthcoming in the face of the Sioux Tribe's rejection of the settlement by most of the constituent tribes.

The fact that in *Ward Baking* there was no settlement at all (because the government has not agreed to the defendants' proposed consent judgment), whereas in the present case counsel for both sides had agreed to a settlement,

does not distinguish this case from *Ward Baking*. The critical point in both cases is the same: the trial court could not impose upon the parties a settlement to which they had not agreed. Although the Sioux Tribe's lawyers had agreed to the settlement and had strongly recommended to their clients that they accept it, those facts did not justify the Claims Court's imposing the settlement upon the Indians or upon the government, whose acceptance of the settlement was contingent upon its acceptance by the other side.

In addition to *Ward Baking*, we have found only three other cases in which a trial court entered as its judgment a proposed settlement to which the parties had not agreed; in all of them the courts took such action as a sanction for what the court regarded as improper conduct by a party. *Bennet Box & Pallet Co.*, 218 Ct. Cl. 636, 638 (1978) (excessive discovery by government and inadequate responses by government to the plaintiff's interrogatories); *United States v. Armbruster*, 446 F. Supp. 866 (S.D.N.Y. 1977) (settlement imposed "for failure of the government to act promptly and fairly" upon a proposed settlement in a tax case to which trial counsel for both sides had agreed); *White Mountain Apache Tribe v. United States*, 6 Cl. Ct. 575 (1984) (settlement offer imposed by the Claims Court upon an Indian tribe as a sanction for lack of prosecution of its case and failure to comply with court orders), *rev'd*, 776 F.2d 1063 (Fed. Cir. 1985). Whatever may be the correctness of those actions—an issue upon which we express no opinion—they are not relevant here, since the Claims Court stated that it was not "imposing the negotiated settlement offer . . . as a sanction . . . ."

B. The second ground of the Claims Court's decision —that the settlement offer constituted "fair and equitable

payment for the plaintiff's historical claim''—also is an inadequate basis for imposing the settlement upon the parties. Since the government had not yet introduced the detailed evidence upon which it relies to establish particular offsets, there was no basis in the record upon which the Claims Court could determine that the settlement offer constituted "fair and equitable compensation for the Sioux tribal land ceded under the 1868 Treaty." Indeed, this ruling bears a striking similarity to the district court's conclusion in *Ward Baking* that the defendants' proposed judgment there "provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint," 376 U.S. at 330—a conclusion the Supreme Court held could not be reached without a trial.

Rule 52(a) of the Rules of the Claims Court, which in its pertinent language is identical to Rule 52(a) of the Federal Rules of Civil Procedure, provides that "[i]n all actions tried upon the facts, the court shall find the facts specifically" and that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . ." The Claims Court decision in this case, which resolved factual disputes regarding the amount of offsets to which the government was entitled, did not comply with this requirement for findings of fact. Moreover, in the absence of record evidence against which the court's findings could be evaluated, we have no basis for determining whether the finding is clearly erroneous.

In *Ward Baking,* the Supreme Court pointed out that "[i]t would be a rare case where all the facts necessary

for a trial court to decide whether a disputed item of relief was warranted could be determined without an 'opportunity to know the record.' " 376 U.S. at 331. This is no less true where the trial court is required to determine the amount of money the plaintiff is entitled to recover. This is not that "rare case" in which the trial court could make that factual determination without the benefit of a full record.

C. The Claims Court found support for its action, as does the Sioux Tribe here, in the statement by the Court of Claims that "[t]here is a need for innovative handling and treatment, perhaps to devise new procedures that will end the delays that have plagued these cases for so many years." *Navajo Tribe of Indians v. United States,* 601 F.2d 536, 540 (Ct. Cl. 1979). The "innovative handling and treatment" involving "new procedures" to end the lengthy delays in these Indian Claims cases, which the Court of Claims encouraged the trial judges to develop, do not include the imposition of a settlement negotiated by counsel to which the parties did not agree.

III

In its notice of appeal, the Oglala Tribe appealed from the Claims Court order awarding final judgment "for the reason that the United States Claims Court unlawfully exceeded its authority by imposing the United States Government Settlement Offer on the Sioux Tribe of Indians and the Final judgment is not supported by the evidence in the record." In its opening 38-page brief, submitted by different counsel, the Oglala Tribe did not even discuss that issue but addressed other issues that the Claims Court had not decided. In its 29-page reply

brief, the Oglala Tribe merely "concur[red] with" the arguments in the government's opening brief that the Claims Court improperly imposed the settlement upon the parties, and argued only the points it had raised in its opening brief.

The Oglala Tribe urges us to decide the following issues: (1) whether the tribe is entitled to withdraw from the case, (2) whether the Claims Court incorrectly construed certain provisions of the 1868 Treaty and the 1877 Act, and (3) whether the tribe authorized the attorneys who have represented it in this case for more than 35 years to litigate the issues under the 1868 Treaty that the Indian Claims Commission and the Court of Claims decided.

For the reasons given below, we decline to decide those issues.

The only issue open to the Claims Court under the 1980 Court of Claims remand was "to determine the merits of defendant's claim for offsets . . . ." *Sioux Tribe*, 616 F.2d at 494. The only issue the Claims Court decided in the judgment under appeal is that the proper amount of offsets is $4,200,000. The validity of that determination is the only issue before us and the only one we decide.

The issues the Oglala Tribe would have us decide were not raised before, or decided by, the Claims Court. We do not decide them.

IV

In vacating the judgment of the Claims Court and remanding for further proceedings, we are not suggesting that a complete trial on all of the offset issues will be

required. We still urge the Claims Court to develop "innovative handling and treatment, perhaps to devise new procedures that will end the delays that have plagued these cases for so many years." *Navajo Tribe,* 601 F.2d at 540.

For example, perhaps the issues requiring trial can be further narrowed through decision of the three remaining motions for summary judgment and the resolution of any additional summary judgment motions that may be filed. The government may be able to prepare and present summaries of the different categories of offsets it is urging and thus avoid the need for the introduction into evidence of vast quantities of details and minute records going back for more than a century. Finally, the parties may be able to stipulate the total dollar amount of various categories of offsets to which the government is entitled. If the parties can so stipulate, this may be action that counsel for the Sioux Tribe can take as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients. *Cf. Navajo Tribe,* 601 F.2d at 538-39.

CONCLUSION

The judgment of the United States Claims Court is vacated, and the case is remanded for further proceedings in accordance with this opinion.

VACATED and REMANDED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

December 11, 1986

ERRATUM

Appeal Nos. 85-2261
85-2262
85-2264
85-2269

Cheyenne River Sioux Tribe and Oglala Sioux Tribe, and Sioux Tribe of Indians v. The United States

Decided: December 5, 1986

Please make the following correction:

On page 6, second line from the top, change "($2,769,-021.40)" to--($2,669,762.20)—

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHEYENNE RIVER SIOUX TRIBE and OGLALA SIOUX TRIBE,	)	
Appellants/cross-appellees,	)	Appeal Nos.
and SIOUX TRIBE OF INDIANS,	)	85-2261
	)	85-2262
Cross-appellants,	)	85-2264
	)	85-2269
v.	)	
THE UNITED STATES,	)	
Appellee/cross-appellant.	)	

JUDGMENT

ON APPEAL from the United States Claims Court
in CASE NO (S). 74

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:
VACATED and REMANDED

ENTERED BY ORDER OF THE COURT

DATED Dec. 5, 1986 /s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: Dec. 29, 1986

APPENDIX C

IN THE UNITED STATES CLAIMS COURT

No. 74

THE SIOUX TRIBE OF INDIANS	)	Indians; fair and equitable termination of action; imposition of negotiated settlement offer; equitable powers of the Court under the Indian Claims Commission Act, 25 U.S.C. § 70.
v.	)	
THE UNITED STATES	)	

Arthur Lazarus, Washington, D.C., *Marvin J. Sonosky*, Washington, D.C., and *William H. Payne*, Washington, D.C., for plaintiffs.

Edward A. Passarelli, Washington, D.C., with whom was *Assistant Attorney General F. Henry Habicht, II*, for defendant.

ORDER TERMINATING DOCKET 74 AND AWARDING FINAL JUDGMENT

(Filed February 22, 1985)

YOCK, *Judge*.

This case involves the appropriate valuation to be placed upon Sioux tribal land which the plaintiff ceded to the Federal Government under the Treaty of April 29, 1868 (1868 Treaty). 15 Stat. 635. During the last 60 years, the plaintiff, the Sioux Tribe of Indians, has initiated significant litigation involving claims arising out of the 1868 Treaty. *See Sioux Nation of Indians v. United States*, 220 Ct. Cl. 442, 446-47, 601 F.2d 1157, 1159, *aff'd*,

448 U.S. 371 (1980); *Sioux Tribe of Indians v. United States*, 85 Ct. Cl. 181, *cert. denied*, 302 U.S. 717 (1937); *Sioux Tribe of Indians v. United States*, 84 Ct. Cl. 16 (1936). This particular case, seeking adequate compensation for the tribal land ceded to the Federal Government under the 1868 Treaty, has now entered its 35th year of litigation.[1] The case has outlasted two tribunals, the Indian Claims Commission (1945-1978) and the United States Court of Claims (1855-1982), and threatens to outlast the current tribunal, the United States Claims Court, if allowed to proceed ad infinitum. Further, over the last 35 years of litigation, more than 28 judges and commissioners have exercised jurisdiction over this complex litigation.

This case was filed on behalf of the Sioux Tribe of Indians ("Sioux Nation")[2] by eight separate reservation tribes ("reservation tribes"). These eight reservation tribes are: (1) the Crow Creek Sioux Tribe; (2) the Santee Sioux Tribe of Nebraska; (3) the Lower Brule Sioux Tribe; (4) the Oglala Sioux Tribe of the Pine Ridge Reservation; (5) the Cheyenne River Sioux Tribe; (6) the Fort Peck Sioux Tribe; (7) the Rosebud Sioux Tribe; and (8) the Standing Rock Sioux Tribe. For the purposes of this

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[1]On August 15, 1950, the plaintiff filed its original claim with the Indian Claims Commission. In 1978, upon termination of the Indian Claims Commission, this case was transferred to the United States Court of Claims. Subsequently, on October 1, 1982, upon termination of the Court of Claims, this case was transferred to the United States Claims Court.

[2]While this Court recognizes that these eight reservation tribes do not comprise the entire Sioux Nation of Indians, the Court has adopted such terminology in the interests of clarity for purposes of this complex case.

litigation, the eight reservation tribes are represented by three attorneys.[3] As a result, while this case has only one plaintiff, the Sioux Nation, such plaintiff is made up of eight separate and distinct reservation tribes, each with its own legal philosophy and agenda about how the litigation should proceed and with what final result.

Throughout the long history of this case, the plaintiff has claimed that the defendant provided inadequate compensation for the Sioux tribal land ceded to the United States under the 1868 Treaty. The 1868 Treaty, one of several treaties signed at Fort Laramie, resulted in the acquisition by the Federal Government of vast acreage of Sioux tribal land, in what is now North Dakota, South Dakota, Montana, Wyoming and Nebraska. In return, the treaty provisions established the Great Sioux Reservation in the western half of South Dakota and obligated the Federal Government to provide the tribes with money, goods, services, and land.

The remaining issue in this case concerns the amount of valid offsets, if any, that the Federal Government may assert against the plaintiff's interlocutory land valuation award of $43,949,700. *See Sioux Tribe v. United States*, 42 Ind. Cl. Comm. 257 (1978). These remaining offset issues, however, are not inconsiderable. In fact, the defendant claims that it is entitled to some $65 million in total offsets against the plaintiff's $44 million interlocutory land valuation award.

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[3]Mr. Arthur Lazarus, Jr., is the attorney of record in this action for the plaintiff, and specifically represents both the Oglala Sioux Tribe of the Pine Ridge Reservation and the Cheyenne River Sioux Tribe. Mr. William Howard Payne represents the Fort Peck Reservation Sioux Tribe, and Mr. Marvin J. Sonosky represents the remaining five reservation tribes named herein.

The issue now before this Court is whether the Court should terminate this action at this time or allow further prolonged litigation. For the reasons stated herein, and after a long and careful review of all of the evidence now before the Court, this Court has decided to terminate this litigation and to award the plaintiff $39,749,700 as fair and equitable compensation for its claims. This amount reflects the parties' counsels' negotiated settlement agreement as to what they considered to be fair and equitable compensation for the plaintiff's claims, and, more importantly, it represents an amount that this Court believes constitutes fair and equitable compensation for the plaintiff's historical claims, after taking into consideration the plaintiff's interlocutory land valuation award of $43,949,700 and the Federal Government's offset claims of some $65 million.

Facts

In 1950, following the passage of the Indian Claims Commission Act, 60 Stat. 1049 (1946), *codified at* 25 U.S.C. § 70 *et seq.* (1976), the plaintiff filed its original Docket 74 case with the Indian Claims Commission (hereinafter Commission). Throughout the next 28 years, the Docket 74 case was litigated, dismissed, appealed, reconsidered, severed into two claims,[4] and relitigated until the

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[4]The Indian Claims Commission retained those claims relating to the 1868 Treaty, 15 Stat. 635, in Docket 74. The Commission, however, severed those claims arising out of the Act of February 28, 1877, 19 Stat. 254, and reassigned to Docket 74-B those compensation claims for the taking of the Black Hills region in what is now the State of South Dakota. In resolution of the Docket 74-B claims, the Court of Claims awarded the Sioux Indians approximately $104 million dollars for the taking of the Black Hills. *See Sioux Nation of Indians v. United States*, 220 Ct. Cl. 442, 601 F.2d 1157 (1979), *aff'd*, 448 U.S. 371 (1980).

Commission rendered its final decision on the merits, land valuation, and offsets. *Sioux Tribe v. United States,* 42 Ind. Cl. Comm. 214, 256 (1978); *Sioux Tribe v. United States,* 42 Ind. Cl. Comm. 257 (1978).

On July 19, 1978, the Commission awarded the Sioux Nation $43,949,700, as compensation for the total value of the Sioux interests extinguished under the 1868 Treaty. *Sioux Tribe v. United States,* 42 Ind. Cl. Comm. 214 (1978); *Sioux Tribe v. United States,* 42 Ind. Cl. Comm. 257 (1978). However, construing the treaty to be one of peace, rather than cession, the Commission denied the defendant any payments on the claim offsets. In addition, the Commission denied the defendant any gratuitous offsets, based upon the defendant's grossly dishonorable dealings with the plaintiff between 1875 and 1877. *Sioux Tribe v. United States,* 42 Ind. Cl. Comm. 214, 232 (1978). The Commission stated that such conduct "so taint[s] the course of dealings between the United States and the Sioux that we cannot in good conscience offset any gratuitous expenditures by the United States against any Sioux award in this docket." *Sioux Tribe v. United States, supra,* 42 Ind. Cl. Comm. at 232.

On appeal from the above decision of the Commission, the Court of Claims reversed the Commission's decision to deny the defendant any payment on the claim offsets and any gratuitous offsets. *United States v. Sioux Tribe,* 222 Ct. Cl. 421, 616 F.2d 485 (1980). In so holding, the Court of Claims found that the 1868 Treaty was primarily a treaty of cession, rather than a treaty of peace, and, as a result, reasoned that payment on the claim offsets were, "at least in substantial part, compensation for the land

the Indians ceded to the government." *United States v. Sioux Tribe, supra,* 222 Ct. Cl. at 425, 616 F.2d at 487. Thus, the court reversed the Commission's decision denying all of the Federal Government's payment on the claim offsets.

The Court of Claims also reversed the Commission's decision to deny the defendant any gratuitous offsets. In so holding, the court, while recognizing that the Commission had considerable discretion to determine whether to allow gratuitous offsets, held that such a determination must reflect the "entire course of dealings" between the Federal Government and the Sioux.[5] *United States v. Sioux Tribe, supra,* 222 Ct. Cl. at 431, 616 F.2d at 491. The Court of Claims noted, however, that the allowance of such gratuitous offsets is contingent on the entire course of dealings between the defendant and the plaintiff. *United States v. Sioux Tribe, supra,* 222 Ct. Cl. at 432, 616 F.2d at 491. *See also United States v. Emigrant New York Indians,* 177 Ct. Cl. 263, 287 (1966); *Sioux Tribe of Indians of the Lower Brule Reservation v. United States,* 161 Ct. Cl. 413, 416, 315 F.2d 378, 380, *cert. denied,* 375 U.S. 825 (1963).

The Court of Claims further decided that the Federal Government was entitled to an opportunity to show which of the claimed expenditures were payments on the claim for land and which were gratuitous offsets. The case was subsequently remanded to the Court of Claims' trial di-

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[5]Further, the court noted that the Sioux had previously been awarded full compensation for the Federal Government's improper conduct between the years 1875 and 1877. *United States v. Sioux Tribe, supra,* 222 Ct. Cl. at 432, 616 F.2d at 491-92.

vision, now the U.S. Claims Court, for appropriate reconsideration of the amount of Federal Government offsets, if any, which should be allowed against the plaintiff's land valuation award. *United States v. Sioux Tribe, supra,* 222 Ct. Cl. at 433, 616 F.2d at 492. In remanding this case, however, the Court of Claims let stand the Commission's interlocutory land valuation award of $43,949,700 in favor of the plaintiff.

The only issues remaining in this case, therefore, concern the amount of Federal Government offsets, if any, which should be allowed against the plaintiff's $43,949,700 land valuation award. As discussed above, the Federal Government is claiming some $65 million in offsets. However, it appears to this Court, after reviewing all of the evidence, that the total allowable offsets will not exceed some $6 million. Several hundred thousand pages of exhibits have already been presented to the Court and its predecessor tribunals on these issues. This Court tried the course of dealings/historical evidence phase of the offset issue on May 10-13, 1982.

The final accounting phase of the offset issue was scheduled to take place after the parties briefed and the Court decided, six separate summary judgment motions on legal issues. *See Sioux Tribe of Indians v. United States,* No. 74 (Cl. Ct. May 14, 1982) (Trial Judge's Post-Trial Order). This Court has so far decided three of the summary judgment motions concerning payment on the claim offsets, gratuitous offsets, and land adjustment claims. *Sioux Tribe of Indians v. United States,* 6 Cl. Ct. 91 (1984) (Summary Judgment Opinion - I); *Sioux Tribe of Indians v. United States,* No. 74 (Cl. Ct. Feb. 7, 1985) (Summary Judgment Opinion - II); *Sioux Tribe of In-*

dians v. United States, No. 74 (Cl. Ct. Feb. 11, 1985) (Summary Judgment Opinion - III). The three remaining summary judgment motions concern issues involving res judicata/collateral estoppel, the use of vouchers to prove offset claims, and other miscellaneous issues.

In view of the complexity of the issues presented and of the length of time necessary to complete this litigation, this Court has consistently pressed the parties to explore all avenues leading to an expeditious, fair and equitable termination of this litigation, including settlement. Approximately six years ago, counsel for the parties reached agreement on a negotiated settlement which would have resolved this case. *See Sioux Tribe of Indians v. United States,* No. 74 (Cl. Ct. Dec. 13, 1978) (Defendant's Motion for Enlargement of Time). However, this settlement proposal failed to gain the approval of the plaintiff, since the governing bodies of six of the eight reservation tribes simply refused to consider the settlement offer. The other two reservation tribes agreed to the settlement offer.

Following the conclusion of the course of dealings/historical evidence phase of the offsets trial, held on May 10-13, 1982, the parties again indicated their willingness and desire to attempt a negotiated settlement agreement. Shortly thereafter, counsel for the plaintiff and counsel for the Federal Government reported to the Court that they had again negotiated a settlement agreement which they considered to be in the best interest of all of the parties. In this regard, the plaintiff's three counsel indicated that they would be submitting the negotiated settlement offer to their respective tribal governing bodies. However, on September 17, 1982, the plaintiff's counsel again reported, at a status conference with the Court, that

they were still having difficulty in getting the tribal governing bodies to consider the negotiated settlement offer. In other words, several of the tribal governing bodies simply refused to consider or to respond to the second negotiated settlement offer. Thus, the proposed settlement agreement was again dead in the water.

At a later status conference, held June 6, 1983, counsel advised the Court that, although they had worked out a settlement figure, they could not settle the case without approval of the tribal bodies. The Court responded that counsel should attempt to stipulate to the facts and/or figures contained in the negotiated settlement agreement. However, counsel indicated that they could not accomplish such a stipulation, since the various tribal councils could not agree on any type of settlement. Since May of 1982, therefore, a negotiated settlement offer, without time limit for acceptance, has been, and is still, outstanding. *See Sioux Tribe of Indians v. United States,* No. 74 (Cl. Ct. Nov. 10, 1983) (Order).

On October 21, 1983, this Court issued its Order Regarding Settlement Offer. *Sioux Tribe of Indians v. United States,* 3 Cl. Ct. 536 (1983). The order directed the plaintiff's counsel to formally present the negotiated settlement offer to the eight reservation tribes of the Sioux Nation. The order further directed the respective tribal governing bodies to consider the offer of settlement and to act on such offer according to the laws and constitution of their particular tribes. Decisions were to be communicated in writing to their respective legal counsel, who, in turn, would inform the Court of the plaintiff's decision.

The plaintiff's compliance and response to this Court's October 21, 1983, order ,and its supplementary orders, indicate both the lack of consensus between the eight reservation tribes and the resulting quagmire into which the Docket 74 claims have fallen. Two of the reservation tribes accepted the settlement offer outright. Four of the reservation tribes rejected the settlement offer, since it did not include the return of their tribal land—relief over which this Court has no jurisdiction. These four tribes have also indicated their desire to withdraw from this litigation, since they are interested in recovering their land rather than in recovering a monetary award. Finally, two reservation tribes rejected the proposed settlement offer without any explanation except that the offer was inadequate.

Discussion

The chaos into which the plaintiff's claim has evolved is not unusual for cases filed pursuant to the Indian Claims Commisson Act, 60 Stat. 1049 (1946), *codified at* 25 U.S.C. § 70 *et seq.* (1976). Prior to the Indian Claims Commission Act, Indian treaty claims against the Federal Government were effectively barred from being presented to the Court of Claims. House Committee on Indian Affairs, H.R. Rep. No. 1466, 79th Cong. 2d Sess. 2, *reprinted in* 1946 U.S. Code Cong. & Ad. News 1347, 1348. *See also* Act of March 3, 1863, ch. 92, § 9, 12 Stat. 765, 767;[6] *Temoak Band of Western Shoshone Indians, Nevada v. United States*, 219 Ct. Cl.

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[6]The Act of March 3, 1863, provides in pertinent part that the Court of Claims' jurisdiction "shall not extend to or include any claim against the government * * * growing out of or dependent on any treaty stipulation entered into with * * * the Indian tribes." Act of March 3, 1863, ch. 92, § 9, 12 Stat. 765, 767.

346, 357, 593 F.2d 994, 1000, *cert. denied,* 444 U.S. 973 (1979).

Indians wishing to commence litigation had to petition Congress for a statute granting jurisdiction. The process was a nightmare of procedural obstacles and of constant delays, often resulting in a dismissal on the basis that the issues being litigated exceeded the scope of the jurisdictional statute. H.R. Rep. No. 1466, *supra,* at 1352-53; *White Mountain Apache Tribe of Arizona v. United States,* 6 Cl. Ct. 575, 583-84 (1984); *Otoe and Missouria Tribe of Indians v. United States,* 131 Ct. Cl. 593, 604, 131 F. Supp. 265,272, *cert denied,* 350 U.S. 848 (1955).[7] Little judicial relief was thus available to Indian tribes for the Federal Government's past treaty violations. H.R. Rep. No. 1466, *supra,* at 1352-53; *White Mountain Apache Tribe of Arizona v. United States, supra,* 6 Cl. Ct. at 583-84; *Otoe and Missouria Tribe of Indians v. United States, supra,* 131 Ct. Cl. at 604, 131 F. Supp. at 272.

In order to correct this situation, Congress passed the Indian Claims Commission Act, 60 Stat. 1049 (1946), *codified at* 25 U.S.C. § 70 *et seq.* (1976), which provided a forum in which Indian tribes could seek financial redress and final settlement of any and all historical treaty claims against the Federal Government. H.R. Rep. No. 1466, *supra,* at 1347-49; *White Mountain Apache Tribe of Arizona v. United States, supra,* 6 Cl. Ct. at 583-84;

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[7]*See also Blackfeather v. United States,* 190 U.S. 368 (1903); *See generally* Cowen, Nichols and Bennett, The United States Court of Claims — A History Part II: Origin — Development — Jurisdiction 1855-1978, 216 Ct. Cl. 1, 100 (1978); *Indian Breach of Trust Suits: Partial Justice in the Court of the Conqueror,* 33 Rutgers L. Rev. 502, 509-19 (Winter 1981).

Temoak Band of Western Shoshone Indians v. United States, supra, 219 Ct. Cl. at 354, 593 F.2d at 998. The legislative history, preceding the enactment of the Indian Claims Commission Act, clearly reflects the congressional intent to provide Indian tribal members with access to this nation's courts:

> The bill in its present form is primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted. Today any white man who has supplied goods or services to the United States under contract may, if the United States has failed to carry out its part of the bargain, go into the Court of Claims, or, in certain cases, into the Federal district courts, and secure a full, free, and fair hearing on his claims against the government. This is an integral part of the American system of justice under which the humblest citizen and the highest official are equal before the law. The only American citizen today who is denied such recourse to the courts is the Indian.

H.R. Rep. No. 1466, *supra,* at 1347-48.

Conceived as a temporary, quasi-judicial tribunal, the Indian Claims Commission was to hear and to decide all of the Indian claims cases before its 1956 expiration date. However, between 1946 and 1951, Indian tribes filed more than 370 petitions, covering 617 dockets. United States Indian Claims Commission Final Report, at 5, 7-8 (Sept. 30, 1978). This forced Congress to extend the Commission's life several times to accommodate the numerous trials and resulting complexities. Cowen, Nichols and Bennett, The United States Court of Claims—A History Part II: Origin—Development—Jurisdiction 1855-1978, 216 Ct. Cl. 1, 100 (1978). Before its demise in 1978, the Commission awarded tribal members over $800 million in

judgments. United States Indian Claims Commission Final Report, *supra,* at 21. Due to the age and complexities inherent in Indian tribal cases, coupled with the necessarily ponderous and laborious litigation procedures, Indian claim cases bogged down, often taking more than thirty years to reach a final resolution. United States Indian Claims Commission Final Report, *supra,* at 6-19. *See, e.g., Oneida Nation of New York v. United States,* 231 Ct. Cl. 990 (1982) (order granting motions to dismiss); *Navajo Tribe of Indians v. United States,* 220 Ct. Cl. 360, 367-68, 601 F.2d 536, 540 (1979), *cert. denied,* 444 U.S. 1072 (1980); *Temoak Band of Western Shoshone Indians, Nevada v. United States, supra,* 219 Ct. Cl. at 353, 593 F.2d at 998. Upon expiration of the Commission's statutory existence, all of its pending cases were transferred to this Court's predecessor, the Court of Claims. By September 30, 1978, the Indian Claims Commission had transferred 170 cases to the Court of Claims. Court of Claims History, *supra,* 216 Ct. Cl. at 100.

At this time, the instant litigation has devolved into an uncontrolled quagmire. Counsel for the plaintiff, after negotiating a fair and equitable settlement of this case, were unable to effectively present the offer to the reservation tribes without a court order directing the reservation tribe's to consider the offer. The simple fact that four of the reservation tribes are refusing to accept any settlement or award of this Court, which does not include the return of their land, is indicative of the plaintiff's refusal to comprehend, after 35 years of litigation, that this Court can only award money judgments.

As a result, this Court is now faced with eight reservation tribes which lack any apparent cohesion in the

further prosecution of this law suit. *See* Appendix I. This particular case is uniquely complicated in that, while there is only one plaintiff, the Sioux Nation, there are eight separate and distinct reservation tribes making up that plaintiff. In responding to this Court's Order Regarding Settlement Offer, the eight reservation tribes clearly demonstrated that they are unable to agree on the future course of this litigation. Half of the reservation tribes want to withdraw from the instant litigation, regardless of the possibility that they will never again be able to seek monetary compensation for their Docket 74 claims in this Court. Two of the reservation tribes recognize that further litigation is fruitless and are willing to accept the negotiated settlement offer, and the remaining two reservation tribes have refused the negotiated settlement offer even though continued litigation will result, in all probability, in their being awarded an amount roughly comparable to that of the settlement offer recently considered.

As a result, this Court can envision the continuation of this litigation *ad infintum*. The eight reservation tribes have been unwilling to grasp and to comprehend the type of relief which this Court can award and to prosecute this case in a coordinated manner. Counsel for the reservation tribes, on the other hand, have been unable to accede to many of their clients' wishes, since they are aware of the limitations inherent in this Court's jurisdiction over this case. Thus, the case grinds its way slowly forward, regardless of the wishes of the plaintiff or of its attorneys, putting an ever increasing burden on the resources of this Court. It may well be that the past leaders of the current reservation tribes initiated this suit, some 35 years ago, for reasons that are no longer consistent

with the wishes of the current tribal governing bodies. However that may be, some rational direction in this lawsuit must be given. *See* USCC Rule 1(a) (2), Rule 77(e), and Rule 77.1(a).

In response to this Court's Order Regarding Settlement Offer, the eight reservation tribes passed resolutions indicating their intentions regarding the continued prosecution of this case. *See* Final Status Report on Settlement Offer filed November 14, 1984 and attached hereto as Appendix I. Specifically, the eight tribal decisions are as follows:

A. *Tribes Voting To Accept the Settlement*

(1) *The Crow Creek Sioux* Tribal Council, on April 10, 1984, in special session, voted unanimously, to accept the negotiated settlement offer in the amount of $39,749,700. Tribal Resolution CC-84-04-10-02 (Apr. 10, 1984).

(2) The Tribal Council of the *Santee Sioux Tribe of Nebraska,* on October 9, 1984, passed Resolution 85-1, approving the settlement offer in the amount of $39,749,700.

It is apparent that both the Crow Creek Sioux and the Santee Sioux recognize that continued litigation of this case is counterproductive and that the negotiated settlement offer reflects a fair and equitable solution to the continued litigation of this case. In both cases, counsel for these reservation tribes recommended that the tribal counsel accept the settlement offer. As a result, both of these reservation tribes voted to accept their proportionate share of the $39,749,700 offer and to terminate this litigation.

B. *Tribes Seeking the Return of Their Land*

(3) The *Lower Brule Sioux* Tribal Council, in regular session, on April 20, 1984, passed Resolution Nos. 84-44, 84-45, 84-46 and 84-47, rejecting the negotiated settlement offer and directing its attorneys to "withdraw Docket 74 without prejudice to the Tribe and assist the Tribe in seeking the restoration of federal lands in the Black Hills and western South Dakota by legislation as a complete settlement for both Dockets 74 and 74B."[8]

(4) The *Oglala Sioux* Tribal Council of the Pine Ridge Reservation, in regular session, on September 13, 1983, unanimously passed Resolution No. 83-160, which stated that its attorney "has no authority to represent the interests of the Oglala Sioux Tribe in Docket 74, and that it is the tribe's official position that Docket 74 be withdrawn from the Court of Claims and the tribe will seek a restoration of its 1868 Ft. Laramie lands either through court action or as a final legislative settlement for the

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[8]Although the Indian Claims Commission separated into two dockets the lands affected by the 1868 Treaty (Docket 74) and those affected by the Act of Feb. 28, 1877, 19 Stat. 254, (Black Hills case Docket 74-B), several of the reservation tribes consider and treat both dockets as part of the same claim. *See* Lower Brule Sioux Tribe, Resolution Nos. 84-44, 84-45, 84-46, and 84-47 (Apr. 20, 1984); Resolution of the Oglala Sioux Tribal Council, Resolution No. 83-160 (Sept. 13, 1983); Fort Peck Sioux Council Resolution #8-84-6 (June 8, 1984).

Seven of the eight reservation tribes of Docket 74 and Docket 74-B have formed the Black Hills Steering Committee (the Santee Sioux Tribe of Nebraska has apparently not joined the Committee). The Committee plans to draft proposed legislation that seeks the restoration of the Sioux tribal land at issue in both Docket 74 and Docket 74-B and to lobby the U.S. Congress for enactment of such legislation. *See* Lower Brule Sioux Tribe, Resolution 84-46 (April 20, 1984); Fort Peck Sioux Council, Resolution #8-84-6 (June 8, 1984).

Black Hills claims controversy." Resolution of the Oglala Sioux Tribal Council of the Oglala Sioux Tribe, No. 83-160 (Sept. 13, 1983). *See also* Resolution of the Oglala Sioux Tribal Council of the Oglala Sioux Tribe, No. 84-47 (Apr. 17, 1984), reaffirming the September 13, 1983 Resolution.

(5) *The Cheyenne River Sioux* Tribal Council, in special session, on October 15, 1984, passed Resolution No. 224-84-CR, declaring that the tribe reaffirms its "claim for the lands that are specified in Docket 74 and that this rejection of the monetary award shall not constitute abandonment of our claim [for that land]." Further, the Resolution unequivocally stated that "the award of the $44 million by the Court of Claims is not acceptable to the members of the Cheyenne River Sioux Tribe."

(6) *The Fort Peck Sioux Council,* on February 15, 1984, adopted Resolution No. 3-84-2, which accepted and approved the "offer made by the United States to settle for the entry of final judgment in the sum of $39,749,700 in Case No. 74 * * *." Resolution No. 3-84-2 was adopted by a vote of 64 to 11 in favor of accepting the settlement offer. However, on June 8, 1984, the Tribal Council passed Resolution 8-84-6, rescinding "all prior actions taken by the Fort Peck Sioux Council concerning the Black Hills Dockets 74 and 74-B * * *." In this second Resolution, the Fort Peck Sioux Council further expressed approval and support for "the coordinated assertion by the [Black Hills Steering Committee] member tribes of their claims to retain lands in the Black Hills and refuse compensation for the extinguishment of title to such lands in the Black Hills." Resolution 8-84-6 (June 8, 1984). Resolution No. 8-84-6 was approved by a vote of 21 to 0.

Between 1863 and 1946, virtually no form of treaty-related redress was available to Indian tribes. When, in 1946, the Indian Claims Commission was created, the award of a money judgment offered an Indian tribe's "only hope for justice." *Temoak Band of Western Shoshone Indians, Nevada v. United States, supra,* 219 Ct. Cl. at 350, 593 F.2d at 996. However, over the course of the last thirty-nine years, some Indian tribes have been advised that monetary compensation is insufficient and/or inappropriate, since a monetary award would be inconsistent or incompatible with their legal assertion of title to their ancestral land. Indeed, that is true. An Indian tribe cannot maintain an action for recovery of inadequate compensation given to the Indians for their ceded land, while also arguing that the same land was never ceded at all. These are classic mutually exclusive arguments. *Cf. United States v. Oneida Nation of New York,* 217 Ct. Cl. 45, 67 n.26, 576 F.2d 870, 882 n.26 (1978). In any event, these tribes now believe that justice requires that their original homeland should be returned to them along with, in some cases, monetary damages. *See Oneida Nation of New York v. United States, supra,* 231 Ct. Cl. at 990-91; *Temoak Band of Western Shoshone Indians, Nevada v. United States, supra,* 219 Ct. Cl. at 349, 350, 593 F.2d at 995, 996.

Unfortunately, this Court lacks jurisdiction to return such land to the Indians. Generally, the only suits over which this Court has jurisdiction are those in which the plaintiff seeks money damages, rather than the return of the disputed land itself. *United States v. Testan,* 424 U.S. 392 (1976); *United States v. King,* 395 U.S. 1 (1969); *Eastport Steamship Corp. v. United States,* 178 Ct. Cl. 599, 605, 372 F.2d 1002, 1007 (1967). This rule holds true even

where the plaintiff brings its action under the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* (1976). The legislative history indicates that Congress, in forming the Indian Claims Commission, contemplated only the award of money damages, rather than the return of the land itself. *See, e.g.*, 92 Cong. Rec. 5312 (1946) (statement of Rep. Henry M. Jackson).[9]

The Federal Government, as the sovereign, is immune from suit, unless it expressly consents to be sued. *United States v. Mitchell*, — U.S. —, 103 S.Ct. 2961, 2965 (1983); *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. Shaw*, 309 U.S. 495, 500-01 (1940); *Minnesota v. United States*, 305 U.S. 382, 387 (1939). Therefore, when the Federal Government consents to be sued, the "terms, conditions and qualifications of such consent must be scrupulously followed." *Coleman v. United States Bureau of Indian Affairs*, 715 F.2d 1156, 1161 (7th Cir. 1983). *See United States v. Mitchell, supra*, — U.S. at —, 103 S.Ct. at 2967-69; *United States v. Sherwood, supra*, 312 U.S. at 586-87. *Temoak Band of Western Shoshone Indians, Nevada v. United States, supra*, 219 Ct. Cl. at 354-55, 593 F.2d at 998-99. Congress may prescribe that the parties follow particular procedures, invoke particular tribunals, or pursue a specific remedy. *Coleman v. United*

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[9]Rep. Jackson, Chairman of the House Committee on Indian Affairs, stated, "[l]et us pay our debts to the Indian tribes that sold us the land that we live on. They sold it for little enough, generally a few cents an acre. Let us at least pay what we promised to pay, if we have not already done so, and let us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed." 92 Cong. Rec. 5312 (1946).

States Bureau of Indian Affairs, supra, 715 F.2d at 1161. *See Temoak Band of Western Shoshone Indians, Nevada v. United States, supra,* 219 Ct. Cl. at 354-55, 593 F.2d at 998-99.

In creating the Indian Claims Commission, Congress established a special tribunal capable of awarding only money damages as the appropriate measure of compensation. *Coleman v. United States Bureau of Indian Affairs, supra,* 715 F.2d at 1161 n.37. *See* United States Indian Claims Commission Final Report, *supra,* at 8, 21. The very purpose of the Indian Claims Commission was to compensate Indian tribes for any inadequate compensation paid by the Federal Government for the Indians' ceded land, while protecting the interests of those presently possessed of that land. *Coleman v. United States Bureau of Indian Affairs, supra,* 715 F.2d at 1160. *See Indian Breach of Trust Suits: Partial Justice in the Court of the Conqueror, supra,* 33 Rutgers L.Rev. at 516-17. Indeed, the legislative history of the Indian Claims Commission Act reflected the congressional concern that the Indian tribes' lack of adequate compensation for their ceded land served as a barrier to tribal economic progress. H.R. Rep. No. 1466, *supra,* at 1351.

Thus, this Court clearly lacks jurisdiction to grant the principal relief sought by the Lower Brule Sioux Tribe, the Oglala Sioux Tribe, the Cheyenne River Sioux Tribe, and the Fort Peck Sioux Tribe. The parties cannot maintain an action in this Court which is inconsistent with this Court's jurisdiction. An action seeking the return of their ancestral land must be maintained elsewhere.

Ordinarily, a plaintiff desiring relief which is unavailable in this Court would file a motion to dismiss the

case, without prejudice, in order that other avenues of relief could be pursued. This, however, is anything but an ordinary case. Here, no such motions have been filed by the respective plaintiff's counsel. Even if such motions were filed on behalf of the above four reservation tribes, this Court would be forced to deny the motions. Since this case involves a single plaintiff, the Sioux Nation, the Court cannot allow any of the reservation tribes which make up the plaintiff to sever themselves from this litigation. If such severance was allowed, the remaining four reservation tribes would be entitled to share in the full land valuation amount ultimately awarded in this case. As such, they would be unjustly enriched, while the Indians making up the four withdrawing reservation tribes would be precluded from ever recovering any monetry award based on the claims raised in Docket 74. Thus, this Court believes that such dismemberment of the plaintiff would be impossible under the factual circumstances presented herein.

Moreover, to allow the withdrawal of some of the reservation tribes for the purpose of their seeking title to their land in another forum, while at the same time allowing the remaining reservation tribes to seek monetary compensation for the same ceded land, would be simply inappropriate as it would be putting this Court's imprimatur on an inconsistent legal theory. Only if all of the eight reservation tribes making up the plaintiff in this action agreed to move for a voluntary dismissal, without monetary compensation, would this Court grant such a motion.

C. *Tribes Rejecting the Settlement Offer*

(7) *The Rosebud Sioux* Tribal Council, on April 30, 1984, passed Resolution No. 84-103, rejecting "the offer

of the U.S. Government to settle Docket 74 out of court for $39,749,700." The Resolution further indicated that at least one of the reasons behind the reservation tribe's actions was the "injustice of U.S. government offsets" and in the interest of a fairer judgment, "the Rosebud Sioux Tribal Council must seek other options before a settlement is made on Docket 74." The Resolution does not reveal, however, what other options the tribe believes to exist. However, this Court notes that the Rosebud Sioux Tribe has also joined the Black Hills Steering Committee, evidencing an interest in bringing about the eventual return of their ancestral homeland.

(8) The *Standing Rock Sioux Council,* on April 24, 1984, passed Resolution No. 89-84, rejecting and disapproving the Government's offer to settle, with no further indications as to its intentions in pursuing further litigation in this case. Again, it is noted, however, that the Standing Rock Sioux have also joined the Black Hills Steering Committee, thereby evidencing its interest in pursuing a course of action that seeks the return of its ancestral homeland. Additionally, on May 1, 1984, this Court received a mailgram signed by eleven members of the Upper and Lower Yanktonai Band of the Standing Rock Sioux reservation. The signatories stated that they refused to submit to the Court's Order Regarding Settlement Offer. *Sioux Tribe of Indians v. United States,* 3 Cl. Ct. 536 (1983). Further, those signing the mailgram sought to withdraw from the litigation in order to pursue restoration of the 1868 Ft. Laramie Treaty land. While this transmission may indicate the reasons underlying the Standing Rock Tribe's rejection of the settlement offer, those signing the mailgram appear to hold no official po-

sition and appear to lack authority to speak for the 5,000 tribal members.

While the Rosebud Sioux Resolution refers to that reservation tribe's desire to obtain a fairer judgment, this Court is unable to conceive of a potentially fairer judgment. As discussed herein, the negotiated settlement offer reflects an amount which this Court believes would be roughly comparable to the resulting final award after further extensive litigation. In fact, as mentioned *infra*, this Court believes that the negotiated settlement offer will result in more money to the reservation tribes, than if this litigation is allowed to continue.

In any event, this Court is forced to consider the Rosebud Sioux Resolution and the Standing Rock Sioux Resolution as reflecting these reservation tribes' hope that a final termination of this litigation will include the return of their tribal land. However, as discussed above, this Court has no jurisdiction to award such relief.

Alternatives

In view of the above discussion, this Court is now confronted with three alternative courses of action:

(1) Allow the instant litigation to proceed to its final conclusion, culminating in an award of a money judgment. This is an alternative that could well take many years of further litigation and require a majority of the reservation tribes to participate in an action which they no longer wish to maintain. Further, the ultimate result of such continued litigation will undoubtedly be the award of money damages roughly comparable to the negotiated settlement offer;

(2) Dismiss the instant litigation for lack of jurisdiction, based upon a majority of the reservation tribes demanding the return of their tribal land in addition to money damages and thus constructively moving for a voluntary dismissal of this action. This alternative seems grossly unfair to the remaining reservation tribes, who, after some 35 years, are willing to accept a money judgment as full compensation for their claims; or

(3) Terminate the instant litigation and enter a fair and equitable money judgment in favor of the plaintiff.

This Court views the latter alternative to be the most fair and equitable solution. Six of the eight reservation tribes have indicated that they no longer wish to go forward with this litigation (*i.e.*, two reservation tribes indicated that they wish to accept the negotiated settlement offer and four reservation tribes indicated that they wish to withdraw from this litigation to seek the eventual return of the tribal land ceded under the 1868 Treaty). Since, therefore, six of the eight reservation tribes have specifically indicated that they no longer wish to litigate the instant case further, the majority must rule, and the litigation should properly be terminated.

After considering all of the voluminous evidence before it, this Court believes that the negotiated settlement reached by counsel for both parties in this case represents a fair and equitable monetary amount to be awarded the

plaintiff.[10] Therefore, judgment is hereby entered in the plaintiff's favor in the amount of $39,749,700, representing an amount which the plaintiff's counsel and the Federal Government's counsel agreed upon and which this Court believes constitutes fair and equitable compensation in full satisfaction of the plaintiff's claims in this case. Truly, this case fits Sir Winston Churchill's famous quotation uttered in a radio broadcast on October 1, 1939: "It is a riddle wrapped in a mystery inside an enigma." *See* Bartlett, J., *Familiar Quotations,* 15th Ed., Little, Brown & Co., at 743.

The Court of Claims, in handling numerous Indian Claims, lamented the delay inherent in moving such cases toward resolution and imposed upon its trial judges an obligation "to expedite these cases, and to take all necessary steps to ensure their speedy determination." *Navajo Tribe of Indians v. United States, supra,* 220 Ct. Cl. at 367-68,

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[10]The negotiated settlement offer is $39,749,700. The plaintiff's interlocutory land valuation award is $43,949,700. As a result of this Court's decision in Summary Judgment Opinion — III, the Federal Government is entitled to $2,669,762.20 in offsets for land inadvertently transferred to the plaintiff under the 1868 Treaty. *The Sioux Tribe of Indians v. United States,* No. 74 (Cl. Ct. Feb. 11, 1985) (Summary Judgment Opinion — III). After reducing the plaintiff's land valuation award by such offset, the plaintiff is now entitled to $41,279,937.80. The difference between this amount and the negotiated settlement award is some $1.5 million. However, the Federal Government is still entitled to an opportunity to prove a number of additional offsets, amounting potentially to some $56 million, which could conceivably reduce the land valuation award, to which the plaintiff is entitled, below that of the proposed negotiated settlement offer. Further, this Court would note that the interest alone, on an award of $39,749,700, will almost exceed the $1.5 million difference in the first year alone. As a result, further litigation of this case will only result in the plaintiff effectively recovering less money than is currently being awarded by this Court.

601 F.2d at 540. *See Minnesota Chippewa Tribe v. United States,* 227 Ct. Cl. 538, 542 (1981); *Navajo Tribe of Indians v. United States,* 224 Ct. Cl. 171, 180, 624 F.2d 981, 985 (1980); *Temoak Band of Western Shoshone Indians, Nevada v. United States,* 219 Ct. Cl. at 354-55, 593 F.2d at 998-99. *See also Short v. United States,* 719 F.2d 1133, 1143 (Fed. Cir. 1983), *cert. denied,* June 18, 1984; *Short v. United States,* 228 Ct. Cl. 535, 547-48, 661 F.2d 150, 157-58 (1981), *cert. denied,* 455 U.S. 1034 (1982); *White Mountain Apache Tribe of Arizona v. United States,* 5 Cl. Ct. 288, 293 (1984); *White Mountain Apache Tribe of Arizona v. United States,* 4 Cl. Ct. 575, 581 (1984); *Hoopa Valley Tribe of Indians v. United States,* 4 Cl. Ct. 656, 657-58 (1984).

The Court of Claims, in directing its trial judges to expedite the resolution of long litigated Indian claims cases, called for the use of innovative procedures whenever necessary to resolve cases in a reasonable time. *Navajo Tribe of Indians v. United States, supra,* 220 Ct. Cl. at 367-68, 601 F.2d at 540. In particular, Judge Davis stated that:

> The objective should always be to conclude the litigation as speedily and simply as feasible, without needless or burdensome steps or complications * * *. As Chief Judge Friedman said in *Navajo Tribe, supra,* [220 Ct. Cl. 360, 601 F.2d 536 (1979)]: "There is a need for innovative handling and treatment, perhaps to devise new procedures that will end the delays that have plagued these cases for so many years. We have faith in the ability of the trial judges to develop such techniques."

Navajo Tribe of Indians v. United States, supra, 224 Ct. Cl. at 180, 624 F.2d at 985 (citations omitted).

Recently, Judge Nettesheim imposed a settlement offer upon the plaintiff tribe as a sanction for lack of prosecution. *See White Mountain Apache Tribe of Arizona v. United States, supra.* In that case, after the plaintiff repeatedly refused to obey the Court's orders, Judge Nettesheim imposed a judgment, on the plaintiff's behalf, in an amount equalling approximately three-fourths of the Government's settlement offer. *See also Short v. United States, supra,* 228 Ct. Cl. at 547-48, 661 F.2d at 157-58 (1981) (the Court formulated standards normally initiated by the trial judge in order to expedite the resolution of a twenty-year old case).

The instant case, however, differs significantly from the settlement offer decision imposed upon the White Mountain Apache Tribe by Judge Nettesheim. Here, the plaintiff, after some significant judicial prodding, has complied with this Court's order. In addition, this Court is not awarding the plaintiff the Federal Government's proposed settlement offer, but, rather, the plaintiff's own counsels' negotiated settlement offer. Further, while Judge Nettesheim imposed the Federal Government's settlement offer as a sanction, this Court is imposing the negotiated settlement offer neither as a sanction nor as a settlement offer *per se*, but simply as the Court's considered judgment as to what would be fair and equitable compensation for the Sioux tribal land ceded under the 1868 Treaty. *See* USCC Rule 1(a)(2), Rule 77(e), and Rule 77.1(a).

In this Court's view, the negotiated settlement offer is fair and reasonable to all concerned. Indeed, counsel for the plaintiff have advised all of the reservation tribes

to accept the negotiated settlement offer on many separate occasions. Further prosecution of this case would, in all probability, result in equivalent compensation for the plaintiff, while, at the same time, forcing those reservation tribes who desire to withdraw from this litigation to involuntarily continue litigating.

As a general rule, this Court lacks general equity jurisdiction. *United States v. Testan*, 424 U.S. 392 (1976); *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 372 F.2d 1002 (1967). However the Indian Claims Commission Act established jurisdiction over:

> (1) claims in law or *equity* arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or *equity*, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a *court of equity;* (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or *equity*.

25 U.S.C. § 70a (1976) (emphasis added). Thus, this Court, standing in the shoes of the now defunct Indian Claims Commission, has acquired the equitable powers originally conferred on the Commission. As a result, after

careful consideration of its responsibilities as a court of law and of equity, this Court feels compelled, in the interests of both justice and equity, to terminate this litigation and to impose the negotiated settlement offer as a final judgment and as a final solution to this case. *See also* USCC Rules 1(a)(2), 77(e) and 77.1(a).

The lack of cohesion among the eight reservation tribes has caused this litigation to lose its way. Four of the respective reservation tribes have passed tribal resolutions stating that they wish to withdraw from the instant case, since they are unwilling to accept any judgment of this Court that does not order the return of their land. Such relief is clearly beyond the scope of this Court's jurisdiction. Two of the tribes want this Court to approve the negotiated settlement offer, and two of the tribes have rejected the settlement offer. Thus, after 35 years of litigation, six of the eight reservation tribes are willing to admit that they want an end to this litigation. The remaining two reservation tribes are apparently unwilling or unable to clearly define their reasons for continuing this litigation. Under these circumstances, this Court has decided, after much consideration, to bring an end to this litigation. In all judicial fairness and equity, this Court can see no good reason for allowing this case to proceed.

It is sincerely hoped that bringing this matter to a close with a fair and equitable money judgment will assist the Sioux Nation in ending the turmoil in their midst and in directing their future energies to developing a productive and healthful tribal environment.

CONCLUSION

For the reasons discussed above, this Court hereby directs the Clerk to enter final judgment for the plaintiff in the amount of $39,749,700, in full and complete satisfaction of all of the plaintiff's claims against the Federal Government which have been raised in Docket 74 and in full and complete satisfaction of all of the Federal Government's offset claims against the plaintiff herein.

IT IS SO ORDERED.

/s/ Robert J. Yock
Judge

[APPENDIX I OF THE OPINION AND ALL EXHIBITS THERETO EXCLUDED EXCEPT EXHIBIT F]

EXHIBIT F

RESOLUTION NO. 84-47
RESOLUTION OF THE OGLALA SIOUX TRIBAL COUNCIL OF THE OGLALA SIOUX TRIBE
(An Unincorporated Tribe)

RESOLUTION RESPONDING TO THE OCTOBER 21, 1983 ORDER OF THE COURT OF CLAIMS TO CONSIDER THE OFFER OF THE UNITED STATES GOVERNMENT TO SETTLE DOCKET 74 (FT. LARAMIE TREATY LAND CLAIMS).

WHEREAS, the United States of America has offered to settle the claim of the separate and distinct sovereign bands of Sioux Indians collectively referred to as the "Sioux Nation" in claims litigation, and

WHEREAS, the settlement offer involves the case identified as No. 74, originally filed in the Indian Claims Commission and now pending before the United States Court of Claims, and

WHEREAS, the terms of the United States' offer are set forth in a July 27, 1982 letter signed by Assistant Attorney General Carol E. Dinkins whereby the United States agrees to settle all claims arising out of Docket 74 for $39,749,700.00 in favor of the Sioux bands which were parties to the 1868 Ft. Laramie Treaty (15 Stat. 635), and

WHEREAS, the Oglala Sioux Tribe has taken an official position on Docket 74 in Oglala Tribal Council Resolution No. 83-160.

NOW THEREFORE BE IT RESOLVED that the Oglala Sioux Tribe hereby affirms Resolution No. 83-160 stating the official tribal position in regards to Docket 74 in the United States Court of Claims.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as undersigned, Secretary of the Oglala Sioux Tribal Council, hereby certify that this resolution was adopted by the vote of: 22 for; 0 against; and 2 not voting, during a REGULAR Session held on the 17 day of APRIL, 1984.

/s/ Eileen H. Iron Cloud
Secretary
Oglala Sioux Tribe

A-T-T-E-S-T:
/s/ Newton Cummings
President
Oglala Sioux Tribe

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RESOLUTION No. 83-160

RESOLUTION OF THE OGLALA SIOUX TRIBAL COUNCIL OF THE OGLALA SIOUX TRIBE

(An Unincorporated Tribe)

RESOLUTION STATING POSITION OF THE OGLALA SIOUX TRIBE ON DOCKET 74.

WHEREAS, the claims attorney contract between the Oglala Sioux Tribe and Arthur Lazarus, Jr. expired by its own terms in 1977 and has not been renewed, and

WHEREAS, in 1978, the Oglala Sioux Tribe elected *not* to refile the Black Hills claim under P.L. 95-254 (92 Stat. 153) and took an official position that it would seek a return of its sacred land instead, and

WHEREAS, it is still the Oglala Sioux Tribe's position that Arthur Lazarus, Jr. has no authority to represent the Oglala Sioux Tribe in any claims litigation and that the tribe intends to continue its efforts to seek land restoration in the Black Hills claim, and

WHEREAS, in a related claim, Docket 74, involving tribal lands in the States of North Dakota, Montana, Wyoming, Nebraska, Northern Kansas and Northeastern Colorado, plus 14 million acres of aboriginal title east of the Missouri River in North and South Dakota, Arthur Lazarus, Jr. has continued to represent the Oglala Sioux Tribe contrary to its actions that he not represent it, and

WHEREAS, the tribe has been informed that Mr. Lazarus has submitted a final brief in Docket 74 and that a final decision will be issued by the Court of Claims at any time, and

WHEREAS, upon a final decision and payment of the Docket 74 award, all tribal interests in Docket 74 will be extinguished, *United States v. Dann,* Slip Opinion Nos. 80-4298 & 80-4345 (9th Cir., May 19, 1983), and

WHEREAS, the Act of February 28, 1877 which confiscated the Black Hills also purportedly took the Docket 74 lands, and

WHEREAS, the Oglala Sioux Tribe has taken an official position that the 1877 Act is unconstitutional, and

WHEREAS, the Oglala Sioux Tribe desires to state its official position in regard to Docket 74.

NOW, THEREFORE, BE IT RESOLVED, that it is the official position of the Oglala Sioux Tribe that Arthur Lazarus, Jr. has no authority to represent the interests of the Oglala Sioux Tribe in Docket 74, and that it is the tribe's official position that Docket 74 be withdrawn from the Court of Claims and the tribe will seek a restoration of its 1868 Ft. Laramie lands either through court action or as a final legislative settlement for the Black Hills claims controversy.

RESOLUTION NO. 83-160
Page Two

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as undersigned, Secretary of the Oglala Sioux Tribal Council, hereby certify that this resolution was adopted by the vote of: 19 for; 0 against; and 0 not voting, during a REGULAR Session held on the 13th day of SEPTEMBER, 1983.

/s/ Eileen H. Iron Cloud
Secretary
Oglala Sioux Tribe

A-T-T-E-S-T:
/s/ Joe American Horse
President
Oglala Sioux Tribe

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APPENDIX D

ARTICLE 5 OF 1851 FT. LARAMIE TREATY (11 STAT. 749)

Article 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

The territory of the Gros Ventre, Mandans, and Arrickaras Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of Big Dry Creek; thence down that creek to where it empties into the Yel-

lowstone River; nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head-waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Bute, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.

It is, however, understood, that, in making this recognition and acknowledgment, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

APPENDIX E

ARTICLES 2, 4, 11, 12, 15 AND 16 OF 1868 FT. LARAMIE TREATY (15 STAT. 635)

Article 2. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel or north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and, in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United

States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

* * *

Article 4. The United States agrees, at its own proper expense, to construct at some place on the Missouri River, near the center of said reservation, where timber and water may be convenient, the following buildings, to wit: a warehouse, a store-room for the use of the agent in storing goods belonging to the Indians, to cost not less than twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding five thousand dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular-saw mill, with a grist-mill and shingle-machine attached to the same, to cost not exceeding eight thousand dollars.

* * *

Article 11. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory

outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase. And they, the said Indians, further expressly agree:

1st. That they will withdraw all opposition to the construction of the railroads now being built on the plains.

2d. That they will permit the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home, or travelling, nor molest or disturb any wagon-trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. They will never capture, or carry off from the settlements, white women and children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte River and westward to the Pacific Ocean, and they will not in future object to the construction of railroads, wagon-roads, mail-stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose,

one of said commissioners to be a chief or head-man of the tribe.

7th. They agree to withdraw all opposition to the military posts or roads now established south of the North Platte River, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

Article 12. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty.

* * *

Article 15. The Indians herein named agree that when the agency-house or other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article 11 hereof.

Article 16. The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or

persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same; and it is further agreed by the United States that within ninety days after the conclusion of peace with all the bands of the Sioux Nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

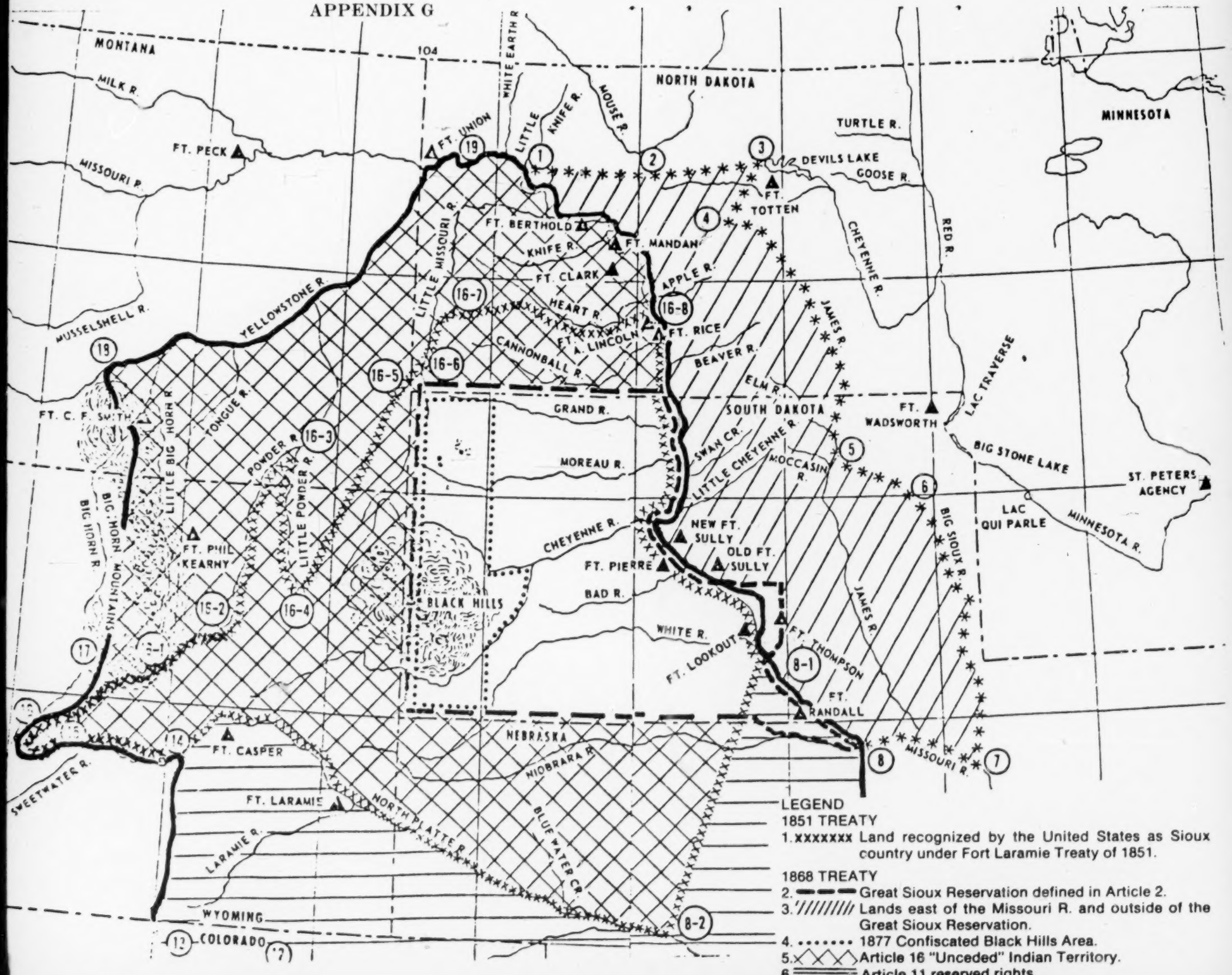
APPENDIX F

ARTICLE 1 OF 1877 AGREEMENT (19 STAT. 254)

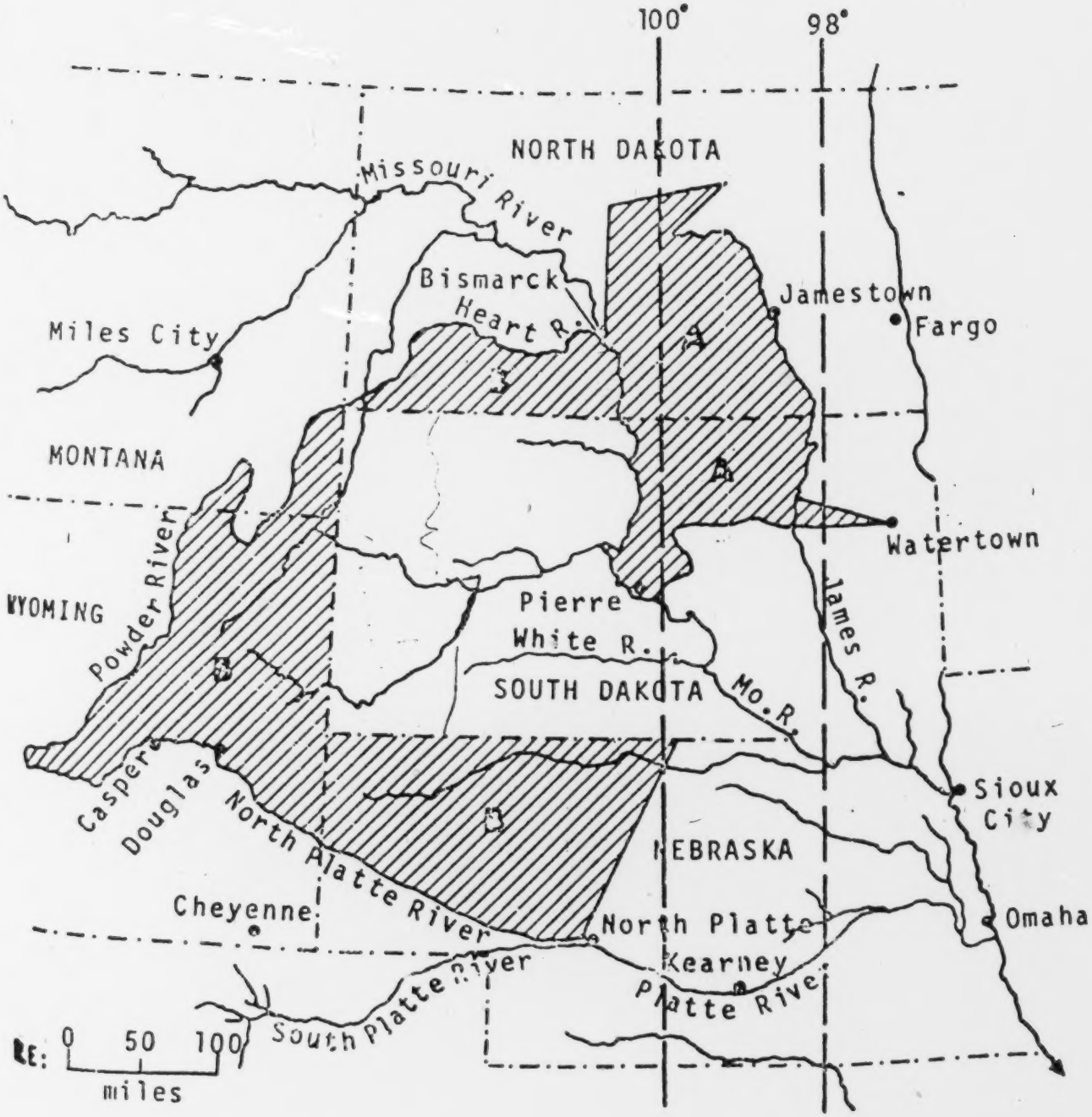
Article I. The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River; and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

SWEET

APPENDIX G


MONTANA
NORTH DAKOTA
MINNESOTA
SOUTH DAKOTA
NEBRASKA
WYOMING
COLORADO
104
MILK R.
MISSOURI R.
MUSSELSHELL R.
YELLOWSTONE R.
WHITE EARTH R.
LITTLE KNIFE R.
MOUSE R.
TURTLE R.
DEVILS LAKE
GOOSE R.
RED R.
CHEYENNE R.
JAMES R.
LAC TRAVERSE
BIG STONE LAKE
ST. PETERS AGENCY
LAC QUI PARLE
MINNESOTA R.
BIG SIOUX R.
MISSOURI R.
FT. UNION
FT. PECK
FT. BERTHOLD
FT. MANDAN
FT. CLARK
FT. A. LINCOLN
FT. RICE
FT. TOTTEN
FT. WADSWORTH
FT. C. F. SMITH
FT. PHIL KEARNY
FT. PIERRE
NEW FT. SULLY
OLD FT. SULLY
FT. LOOKOUT
FT. THOMPSON
FT. RANDALL
FT. CASPER
FT. LARAMIE
LITTLE MISSOURI R.
KNIFE R.
APPLE R.
HEART R.
CANNONBALL R.
BEAVER R.
ELM R.
GRAND R.
MOREAU R.
SWAN CR.
LITTLE CHEYENNE R.
MOCCASIN R.
CHEYENNE R.
BAD R.
WHITE R.
TONGUE R.
POWDER R.
LITTLE POWDER R.
LITTLE BIG HORN R.
BIG HORN R.
BIG HORN MOUNTAINS
BLACK HILLS
NIOBRARA R.
NORTH PLATTE R.
BLUE WATER CR.
LARAMIE R.
SWEETWATER R.
16-1
16-2
16-3
16-4
16-5
16-6
16-7
16-8
8-1
8-2
LEGEND
1851 TREATY
1. xxxxxxx Land recognized by the United States as Sioux country under Fort Laramie Treaty of 1851.
1868 TREATY
2. Great Sioux Reservation defined in Article 2.
3. Lands east of the Missouri R. and outside of the Great Sioux Reservation.
4. 1877 Confiscated Black Hills Area.
5. Article 16 "Unceded" Indian Territory.
6. Article 11 reserved rights.

APPENDIX "A"


100°
98°
NORTH DAKOTA
Missouri River
Bismarck
Heart R.
Jamestown
Fargo
Miles City
MONTANA
Watertown
WYOMING
Powder River
Pierre
White R.
James R.
SOUTH DAKOTA
Mo. R.
Sioux City
Casper
Douglas
North Platte River
NEBRASKA
Cheyenne
North Platte
Omaha
Kearney
South Platte River
Platte River
0 50 100
miles

Supreme Court, U.S.
FILED
APR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1451

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,
Petitioner,
v.
THE UNITED STATES OF AMERICA and
THE SIOUX TRIBE OF INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MEMORANDUM IN OPPOSITION OF RESPONDENT SIOUX TRIBE OF INDIANS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

MEMORANDUM IN OPPOSITION OF RESPONDENT SIOUX TRIBE OF INDIANS

This is a case in which the petitioner prevailed before the Federal Circuit, but nevertheless seeks a writ of certiorari to review issues not raised at the trial level and specifically not decided by the court of appeals (Pet. App. 15). The petition is clearly frivolous.

The facts are well stated by Judge Friedman of the Federal Circuit (Pet. App. 2-App. 9). Essentially, the Court of Claims, now the Federal Circuit, seven years ago had found liability on the part of the United States,

and the only issue before the Claims Court on remand was the amount of offsets. *United States* v. *Sioux Tribe*, 616 F.2d 485 (Ct. Cl. 1980), *cert. denied*, 446 U.S. 953 (1980). The Claims Court, however, without a trial on the merits, entered judgment on a proposed settlement never accepted by the eight Sioux tribes which compose the plaintiff Sioux Tribe. The United States, the Sioux Tribe and the Oglala Sioux Tribe (one of the eight tribal representatives) all appealed. The court of appeals reversed, holding a judgment upon an unaccepted settlement to be invalid, and again remanded the case for trial on the offset issue.

There are no extraordinary circumstances calling for interlocutory review by this Court and such review would serve only to delay further this 37-year old litigation.

As noted, the two questions here presented were not raised before the trial court. Moreover, far from having any general significance, the first question involves only the Oglala's particularized concern, not shared by its seven co-plaintiffs below, over remaining a party to a case which is moving to final judgment. Behind the question is the Oglala's apparent dissatisfaction with the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70 *et seq.*, which provides for monetary compensation, not return of land. That issue is properly addressed to Congress, not the courts.

The second question presented is academic. The Court of Claims determined that certain Sioux lands were ceded to the United States under the Treaty of April 29, 1868, 15 Stat. 635 (*United States* v. *Sioux Tribe*, *supra*), whereas the Oglala Sioux Tribe argues that the United States acquired title to this territory under the Act of February 28, 1877, 19 Stat. 254 (Pet. Br. 18-21).* In

* The Sioux land claims under the 1877 Act, of course, already have been adjudicated. *United States* v. *Sioux Nation*, 448 U.S. 371 (1980).

either event, the United States has owned and exercised dominion over the lands for at least 110 years and the exact date that title legally passed should engender no current interest.

Petitioner does not advance even a plausible reason why the writ should be granted, much less meet the criteria set forth in Rule 17.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 86-1451

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October Term, 1986

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Petitioner,

vs.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

INTRODUCTION

This Reply Brief is filed pursuant to Rule 22.5 of the Rules of the United States Supreme Court and addresses issues presented in the Memorandum In Opposition Of Respondent Sioux Tribe of Indians (hereinafter "Memorandum").

ARGUMENT

I. THE TREATY ISSUES ARE MERITORIOUS.

A. The treaty issues are not academic, but are issues important to the public.

The granting of a writ of certiorari is discretionary and occurs only when there are "special and important reasons therefor." See U.S. Supreme Court Rule 17.1. "Special and important reasons" in Rule 17.1 "imply a reach to a problem beyond the academic." See *Rice v. Sioux City Memorial Park*, 349 U.S. 70, 74 (1955).

The treaty issues raised in this case are not academic. They are issues important to the American public who have an interest in seeing that historic Indian land claims are resolved in the fair and honorable manner Congress intended.[1]

B. The Federal Circuit sanctioned a departure by the Claims Court from accepted and usual course of judicial proceedings within the meaning of Supreme Court Rule 17.1(a) by refusing to address the treaty issues.

Respondent argues that the Petition for a Writ of Certiorari (hereinafter "Petition") should be denied because it does not meet the criteria set forth in Rule 17. Memorandum at 3.

---

[1]Indian tribes are wards of the Federal Government. *United States v. Kagama*, 118 U.S. 375, 383 (1886). The American public has an interest in seeing that their Government properly carry out its trust responsibility by paying Indian tribes fair and adequate compensation for land through the Indian Claims Commission process.

Rule 17.1 (a) provides that the Court may exercise its discretion in granting a review on certiorari "(a) [w]hen a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court's power of supervision."

The accepted and usual course of judicial proceedings regarding interpretation of Indian treaties includes adherence to rules of treaty construction established by the Court. These rules, which are set forth on page 19 of the Petition, have not been followed by either the Indian Claims Commission or lower federal courts in this case.

By refusing to address the treaty issues, the Federal Circuit sanctioned a departure by the Claims Court from the usual course of judicial proceedings within the meaning of Rule 17.1.[2]

C. Respondent misconstrues the nature of the 1980 Court of Claims decision.

Respondent asserts that the Court of Claims has already "determined that the certain Sioux lands were ceded to the United States under the Treaty of April 29, 1868." Memorandum at 2. See *United States v. Sioux Tribes*, 222 Ct.Cl. 421 (Ct.Cl. 1980). Respondent, however, mis-

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[2]It is worthy of notice that the Claims Court is now "standing in the shoes of the now defunct Indian Claims Commission," see *Sioux Tribe v. United States*, 8 Cl.Ct. 80, 92 (1985); Petition Appendix at 46, and as such has the authority to reconsider and correct prior administrative rulings of the Commission. See *United States v. Sioux Tribes*, 222 Ct.Cl. 421, 435 (1980) ("It is a well established principle that an administrative agency may reconsider its own decisions").

construes the nature of the 1980 Court of Claims decision which held that:

> The qualifying language in Article II [of the 1868 Treaty] "except as hereinafter provided" refers to the provision in Article XI by which the Sioux retained certain hunting rights, and the provision in Article XVI treating other land as "unceded Indian land." *The exception makes it clear that the cession of land outside the reservation does not include the latter two interests that the Sioux retained.* Indeed the reference to "unceded Indian land" in Article XVI is inconsistent with the argument that the treaty was not one of cession. The provision that under the treaty certain lands would be "unceded" necessarily indicates that other land was being ceded. [Emphasis Supplied].

Id. at 426.

This interpretation of the treaty—although erroneous since no Sioux lands were actually ceded—suggests that the Sioux were ceding only those lands outside the Great Sioux reservation and outside the Article 11 and 16 areas, i.e., the aboriginal title area east of the Missouri River. The "other land" referred to by the court in Article XVI of the treaty is the 1851 Treaty land.

D. The treaty cession theory is contrary to the express language in the 1877 Act which abrogated Article 16 of the 1868 Treaty.

Article 1 of the 1877 Act expressly provides that:

> [T]he said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

19 Stat. 254, Art. 1. This language clearly indicates that all territory lying outside the reduced Great Sioux Reservation, i.e., recognized and aboriginal title territory, was taken by the 1877 Act.

The abrogation of Article 16 of the 1868 Treaty—which provided that 1851 Treaty lands would remain unceded Indian territory—clearly indicates that Congress intended to take all 1851 Treaty lands lying in the Article 16 area.

E. The issue in this case is how the United States acquired Sioux territory.

In regards to the 1851 treaty lands, respondent asserts that "The United States has owned and exercised dominion over the lands for at least 110 years and the exact date that title legally passed should engender no current interest." Memorandum at 3. The issue in this case is not whether the United States acquired ownership of recognized treaty territory through adverse possession. The issue is whether the United States acquired Sioux recognized and aboriginal territory by cession under the 1868 Treaty or by a taking under the 1877 Act.

The distinction between a treaty cession and a taking in this case is important, since the amount of compensation due for a taking of 1851 Treaty territory under the 1877 Act could amount to millions of dollars in interest under the Good Faith Effort Test.[3] See *United*

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[3]The Federal Circuit also fails to distinguish between the recognized and aboriginal title lands in Docket 74 by treating all claims as aboriginal title claims. See *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1047 (Fed.Cir. 1986), Petition Appendix at 3 ("The 1868 Treaty effected the cession

(Continued on following page)

States v. Sioux Nation of Indians, 448 U.S. 371 (1980). The distinction also involves the question of whether the Sioux should be compensated in 1877 dollar values or 1869 dollar values.[4]

F. Sioux claims under the 1877 Act can be raised in Docket 74.

In a footnote, Respondent asserts the Sioux land claims under the 1877 Act have already been adjudicated in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). There is nothing magic about raising 1877 Act claims in Docket 74-B rather than in Docket 74-A, however.

As stated on page 15 n. 14 of the Petition, Petitioner authorized the filing of Docket 74 only upon the theory that its lands outside the reduced Great Sioux Reservation were confiscated by the 1877 Act. See *Sioux Tribe v. United States*, 500 F.2d 458, 484-86 (Ct.Cl. 1974). Petitioner has never expressly or implicitly authorized claims counsel representing it before the Indian Claims Commission to change the legal theory of the case from a taking under the 1877 Act to a cession under the 1868 Treaty. In any event, the "theory of the pleadings" should not have pre-

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(Continued from previous page)

of a large part of land in North and South Dakota, Nebraska, Wyoming, and Montana, to which the Sioux Nation had aboriginal title"). All Sioux lands located in Montana, Wyoming, Nebraska and western North Dakota are lands recognized under the 1851 Treaty.

[4]As noted on page 6 n. 6 of the Petition, the valuation date of 1867 was used by the Indian Claims Commission for Docket 74 lands, since the 1868 treaty was proclaimed on February 24, 1869. See *Sioux Tribe v. United States*, 38 Ind. Cl. Comm. 469, 471, 488 (1976).

vented the Indian Claims Commission (and Claims Court) from applying the applicable law in regards to the 1851 Treaty claims in Docket 74, and should not now prevent Petitioner from having its 1851 Treaty claims reviewed and decided under the Good Faith Effort Test.[5] Indeed, Rule 54(c) of the United States Claims Court expressly provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.*" [Emphasis Supplied].

II. THE ISSUE OF WHETHER THE PETITIONER CAN BE SEVERED FROM DOCKET 74 IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT.

Docket 74 is a complex case involving conflicting claims by the various tribes that comprise the plaintiff "Sioux Tribe."[6] Because of the confusion caused by these conflicting claims over the years, Petitioner believes that its

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[5]Respondent also asserts that Petitioner's claims were not raised at the trial level and not specifically decided by the Federal Circuit. Memorandum at 1. This court can nevertheless consider such issues in "exceptional cases," such as the instant case. See, e.g., *Stone v. Powell*, 96 S.Ct. 3037, 3046 n. 15 (1976).

[6]For example, there are three divisions of Sioux involved in the claim, the Teton, Yantonai and Santee. Only the Teton have claims to the 1851 Treaty lands. And only the Teton and Yanktonai have claims to the aboriginal title lands. The Santee of Nebraska do not appear to have any claims in Docket 74 and it is a mystery to Petitioner why they are still involved in the claim. Since neither the Yanktonai or Santee have any interest in the recognized title claim, it is understandable why they are not pursuing the claim. Other tribes are apparently not aware they have such claims.

interests have been compromised and never properly advocated.

Moreover, Petitioner did request dismissal from the case when it was pending before the Claims Court. Petitioner passed Resolution No. 83-160 which states in pertinent part as follows:

> NOW, THEREFORE, BE IT RESOLVED, that . . . it is the tribe's official position that Docket 74 be withdrawn from the [Claims Court] and the tribe will seek a restoration of its 1868 Ft. Laramie Treaty lands either through court action or as a final legislative settlement for the Black Hills claims controversy.

Sioux Tribe of Indians v. United States, 8 Cl.Ct. 80, 118 (1985), Petition Appendix at 51. For some unknown reason, the same claims counsel who represented Petitioner in the Claims Court, and now claims Petitioner never requested dismissal from Docket 74, failed to file a motion to dismiss in accordance with Petitioner's wishes. Thus, the reason Petitioner did not file a motion to dismiss itself without prejudice from Docket 74 is because it had no counsel advocating its interests before the claims court.

The issue of whether the petitioner can be severed from Docket 74 is therefore an important issue of federal law which has not been, but should be, settled by the court.

———o———

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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MAY 15 1987
CLERK

No. 86-1451

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA AND THE SIOUX TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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v.

UNITED STATES OF AMERICA AND THE SIOUX TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this 37-year old litigation in which the Sioux Tribe seeks compensation for land ceded to the United States, the Claims Court—without receiving evidence or making any findings of fact—entered as its final judgment on the merits an amount equal to a settlement offer previously extended by the government and rejected by the Tribe. All parties appealed that determination; the court of appeals vacated the award and remanded the case for further proceedings. Petitioner here seeks review of the court of appeals' decision not to consider two wholly separate issues that were neither raised in the Claims Court nor decided by that court.

1. In 1950, pursuant to the Indian Claims Commission Act, 25 U.S.C. 70, the Sioux Tribe commenced this proceeding before the Indian Claims Commission seeking compensation for lands that the United States acquired pursuant to a 1868 treaty between the United States and the Sioux Nation (see 15 Stat. 635). The treaty effected the cession of a large part of the aboriginal lands that the

Sioux held in North and South Dakota, Nebraska, Wyoming and Montana. It also established a reservation, and obligated the United States to provide services and goods and make payments to the Sioux. See generally *United States* v. *Sioux Tribe*, 616 F.2d 485 (Ct. Cl. 1980); Pet. App. 3.[1]

In 1978, the Indian Claims Commission entered a land valuation award of $43,940,700. The Commission rejected the government's claim that it was entitled to offsets for certain payments to the Tribe. See *Sioux Tribe* v. *United States*, 42 Ind. Cl. Comm'n 214, 257 (1978). The Court of Claims upheld the land valuation award, but reversed the Commission's denial of offsets. It remanded the case to its trial division for a determination of "the merits of [the government's] claim for offsets." *United States* v. *Sioux Tribe*, 616 F.2d at 494; see also *id.* at 487; Pet. App. 4-5. Following the remand, the trial court did not proceed with a trial regarding the offset question. It instead directed the parties to brief six legal issues relevant to the offset claims. "Treating these briefings as, in effect, motions for summary judgment, the Claims Court in 1984 and 1985 issued three opinions deciding three of the summary judgment motions" (Pet. App. 6).[2] The court has not ruled upon the other three legal issues.

---

[1] The Sioux Nation also sought compensation for lands acquired by the United States pursuant to the Act of February 28, 1877, ch. 72, 19 Stat. 254. That claim was resolved by an award to the Sioux Nation of approximately $106 million. See *Sioux Nation* v. *United States*, 650 F.2d 244 (Ct. Cl. 1981).

[2] The first summary judgment opinion reiterated the Court of Claims' ruling that the government might be permitted to offset its payments to the tribe against the land valuation award; it granted the government the right to present evidence of its offsetting payments in a forthcoming trial. See *Sioux Tribe* v. *United States*, 6 Cl. Ct. 91 (1984). The second summary judgment opinion found that the government's dealings with the Sioux Tribe had been "egregious and unfair" and that "principles of equity and good conscience" barred the allow-

On February 22, 1985—without giving notice to the parties or receiving any briefs on the propriety of its action—the Claims Court issued an order entering judgment against the United States in the amount of $39,749,700 as "fair and equitable compensation" for the Tribe's claims (Pet. App. 22). This amount was equal to a settlement offer twice proposed by the government and rejected by the Tribe (see *id.* at 5-6).

The Claims Court observed that the eight Indian tribes that comprise the Sioux Nation "lack any apparent cohesion [with respect to] further prosecution of this law suit" (Pet. App. 31-32). Two of the tribes had voted to accept the government's settlement offer; four tribes indicated that they would not be satisfied with monetary compensation, but instead sought return of the land that is the subject of this action; the two remaining tribes also appeared to the Claims Court to be in favor of the latter course of action (see *id.* at 33-41). The court observed that it was "confronted with three alternative courses of action": allowing the litigation to proceed to its conclusion; dismissing the action for lack of jurisdiction on the ground that a majority of the tribes sought return of the land; and "[t]erminat[ing] the instant litigation and enter[ing] a fair and equitable money judgment in favor of the plaintiff" (*id.* at 42). It stated that, because "six of the eight reservation tribes have specifically indicated that they no longer wish to litigate the instant case further, the majority must rule, and the litigation should properly be terminated"

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ance of offsets for gratuitous payments made by the government (*Sioux Tribe* v. *United States*, 7 Cl. Ct. 468, 469 (1985)). The third summary judgment opinion permitted the government a land adjustment offset for the value of over 3.5 million acres of land that the government had inadvertently conveyed to the Tribe at the time of the 1868 Treaty (*Sioux Tribe* v. *United States*, 7 Cl. Ct. 481 (1985)).

(*ibid.*). The court concluded that entry of the settlement offer as its final judgment was "fair and reasonable to all concerned" (*id.* at 45).

2. The court of appeals unanimously vacated the Claims Court's judgment and remanded the case for further proceedings (Pet. App. 1-16). It first held that the judgment could not be justified on the ground that it implemented the settlement offer. "Unless a case is settled with the consent of the parties," the court of appeals stated, "the duty of the court is to determine the merits and enter judgment accordingly. Where, as here, the court adopts a settlement as its judgment without consideration of the relevant evidence * * *, the court has failed to perform its obligation to determine the case on the basis of the evidence" (*id.* at 10).

The court of appeals further held that "[t]he second ground of the Claims Court's decision—that the settlement offer constituted 'fair and equitable payment for the [Tribe's] historical claim'—also is an inadequate basis for imposing the settlement upon the parties" (Pet. App. 12-13). Because "the government had not yet introduced the detailed evidence upon which it relies to establish particular offsets, there was no basis in the record upon which the Claims Court could determine that the settlement offer constitutes 'fair and equitable compensation for the Sioux tribal land ceded under the 1868 Treaty' " (*id.* at 13). The court of appeals directed the Claims Court to conduct further proceedings to make that determination (*id.* at 14, 15-16).

The court of appeals noted that petitioner had urged it to decide several other issues including "whether [petitioner] is entitled to withdraw from the case" and "whether the Claims Court incorrectly construed certain provisions of the 1868 Treaty and the 1877 Act" (Pet. App. 15). The court "decline[d] to decide those issues," stating that "[t]he only issue open to the Claims Court under the 1980 Court

of Claims remand was 'to determine the merits of defendant's claim for offsets * * *.' The only issue the Claims Court decided in the judgment under appeal is that the proper amount of offsets is $4,200,000. The validity of that determination is the only issue before us and the only one we decide" (*ibid.* (citation omitted)).

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

Petitioner is simply wrong in asserting that the court of appeals was required to address legal issues that were neither raised in nor decided by the Claims Court. This Court routinely declines to decide legal issues in that posture. See, *e.g.*, *City of Springfield* v. *Kibbe*, No. 85-1217 (Feb. 25, 1987), slip op. 2; *United States* v. *Dann*, 470 U.S. 39, 50 (1985). The court of appeals—which was sitting as an appellate court, not a trial court—did not err by applying that same rule.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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No. 86-1451

In The

Supreme Court of the United States

October Term, 1986

OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA AND THE SIOUX TRIBE OF INDIANS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTION

This Reply Brief is filed pursuant to Rule 22.5 of the Rules of the United States Supreme Court and addresses issues presented in the Memorandum For The United States In Opposition.

ARGUMENT

I. THE ISSUES RAISED IN THE PETITION WERE RAISED OR DECIDED BY THE CLAIMS COURT.

The United States asserts that the Federal Circuit refused to address the issues of " 'whether [petitioner] is entitled to withdraw from the case' and 'whether the Claims Court incorrectly construed certain provisions of the 1868 Treaty and 1877 Act,' " on the basis that only the issue of Government offsets could be decided under the 1980 Court of Claims remand to the Claims Court. U.S. Memorandum at 4-5. They also assert that:

> The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.
>
> Petitioner is simply wrong in asserting that the court of appeals was required to address legal issues that were neither raised in nor decided by the Claims Court. This Court routinely declines to decide legal issues in that posture. * * * The court of appeals—which was sitting as an appellate court, not a trial court—did not err by applying that same rule.

U.S. Memorandum at 5.

The record in this case indicates the contrary, however.

A. The issue of whether the Petitioner can be severed from Docket 74 was decided by the Claims Court.

The issue of whether Petitioner can be severed from Docket 74 was addressed by the Claims Court. The court noted that resolutions to withdraw from the case were

passed by some tribes involved, but no formal motions were ever filed. The court nevertheless ruled that "[e]ven if such motions were filed on behalf of the above four reservation tribes, this Court would be forced to deny the motions," since some tribes which make up plaintiff would be "unjustly enriched" and the withdrawing tribes "would be precluded from ever recovering any monetary award based on claims raised in Docket 74." The court concluded that "[o]nly if all the eight reservation tribes making up the plaintiff in this action agreed to move for voluntary dismissal, without monetary compensation, would this Court grant such a motion." *Sioux Tribe v. United States,* 8 Cl.Ct. 80, 86-89 (1985); Petition Appendix at 38-39.

This ruling adversely effects Petitioner and was properly raised, but not addressed, on appeal. Unless this ruling is reversed, Petitioner may never be able to successfully move to withdraw from Docket 74 unless all the tribes that constitute the "plaintiff" agree to join in the motion.

B. The treaty issues were raised in the original petition and should have been decided by the Indian Claims Commission under the Good Faith Effort Test.

The issue of whether the 1877 Act confiscated 1851 Treaty territory outside the Great Sioux Reservation was raised in the original Docket 74 petition.

The original petition alleged that the 1851 Treaty recognized the right and title of the Teton to a large area of land, including the Black Hills. *Sioux Tribe v. United States,* 500 F.2d 458, 478 (Ct.Cl. 1974). The entire petition

"was based on the taking of [Sioux] lands under the Act of 1877."[1] *Id.*, 500 F.2d at 484.

---

[1] The original petition held title to three classes of land. Class B was described as follows:

> *Class B.* All of that area lying west of the Missouri River and included in the outer boundaries laid down by the treaty of September 17, 1851, exclusive, however, of the area described as the permanent reservation of the Sioux Tribe of Indians by Article II of the treaty of April 29, 1868. To this area, comprising 25,858,594.95 acres, the plaintiffs had absolute and exclusive right to the undisturbed use and occupation.

Original Petition, Paragraph XV. See *Sioux Tribe v. United States*, 500 F.2d 458, 483 (Ct.Cl. 1974).

In the prayer for relief, plaintiffs requested the following relief:

> XXV
>
> *Recovery Due Plaintiffs*
>
> The plaintiffs say they are entitled to payment for their lands on the basis of fair and honorable dealings.
>
> * * * * * * * * *
>
> Plaintiffs therefore claim from defendant, on information and belief as follows:
>
> * * * * * * * * *
>
> 3. *Unceded Lands.* Payment of at least 50 cents per acre for unceded lands, Class B (outside the 1868 Permanent Reservation but declared to be unceded by the 1868 Treaty)—25,858,594.95 acres—together with interest thereon from February 28, 1877, to the date of settlement of this claim.
>
> * * * * * * * * *
>
> Wherefore, the premises considered, plaintiffs pray:
>
> That this petition be considered by the Indian Claims Commission and be reported to the Congress in favor of the plaintiffs in the amount established by the evidence and as hereinbefore set out.
>
> For such other and further relief as to the Commission may seem just and proper in the premises.

See Sioux Tribe v. United States, supra, 500 F.2d at 485.

In summarizing what the original petition contained, the Court of Claims found as follows:

> In summary the following claims were asserted by the Teton plaintiffs in their original petition:
>
> 1. Claims *only* by the eight Teton Sioux Tribes named above whose names are subscribed to the petition.
>
> 2. Claims *only* for the taking of their property by Act of Congress of February 28, 1877, as follows:
>
> * * * * * * *
>
> (e) For 50 cents per acre for 25,858,594.95 acres of unceded lands (Class B described above) outside of the 1868 permanent reservation, together with interest *from February 28, 1877* to date.
>
> * * * * * * *
>
> 3. *All* of the claims were based on recognized title under the Treaties of 1851 and 1868.
>
> 4. *All* of the claims were made with reference to land *west* and *south* of the Missouri River.

[Emphasis in original]. *Sioux Tribe v. United States, supra,* 500 F.2d at 485 (J. Skelton, concurring in part, dissenting in part).

On November 4, 1960, the Indian Claims Commission granted a motion made by the Sioux plaintiffs to amend the original petition by substituting two separate petitions to be designated as Dockets 74-A and 74-B. *Sioux Tribe v. United States, supra,* 500 F.2d at 477. The amended petition in Docket 74-A asserted that the Sioux relinquished the right to permanently occupy the 1851 Treaty territory in Article 11 of the 1868 Treaty. *Sioux Tribe v. United States, supra,* 500 F.2d at 477. The prayer for

relief requested compensation for the value of the territory and rights ceded to the United States under Article 11 of the Treaty. *Id.* at 177.

The Indian Claims Commission subsequently struck the amended petition in Docket 74-A, however, but directed that the issues to be tried under the original petition would include the land and interests ceded by the Treaty of April 29, 1868. Although counsel for the Sioux plaintiffs argued that this effected the same result as if the amended petition in Docket 74-A had been allowed to stand, and the Government agreed with this view,[2] *Sioux Tribe v. United States, supra,* 500 F.2d at 477 n. 21, the allegations and claims contained in the original petition were still before the Indian Claims Commission. The Indian Claims Commission therefore had a *duty* to examine the 1851 treaty claims under the Good Faith Effort Test. See *Fort Berthold Reservation v. United States,* 390 F.2d 686 (Ct.Cl. 1968); *United States v. Sioux Nation of Indians,* 100 S.Ct. 2716, 2741 (1980) ("[W]e approve the [Court of Claims] formulation of the inquiry as setting a standard that ought to be emulated by courts faced with resolving future cases presenting the question at issue here").

o

[2] As noted on page 15 n. 14 of the Petition, the Oglala Sioux Tribe has never knowingly authorized Docket 74 to proceed on a treaty cession theory. The Tribe authorized the case to be filed only upon the theory that tribal lands outside the Great Sioux Reservation were confiscated by the 1877 Act.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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